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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1935.

No. ~~878~~ 20

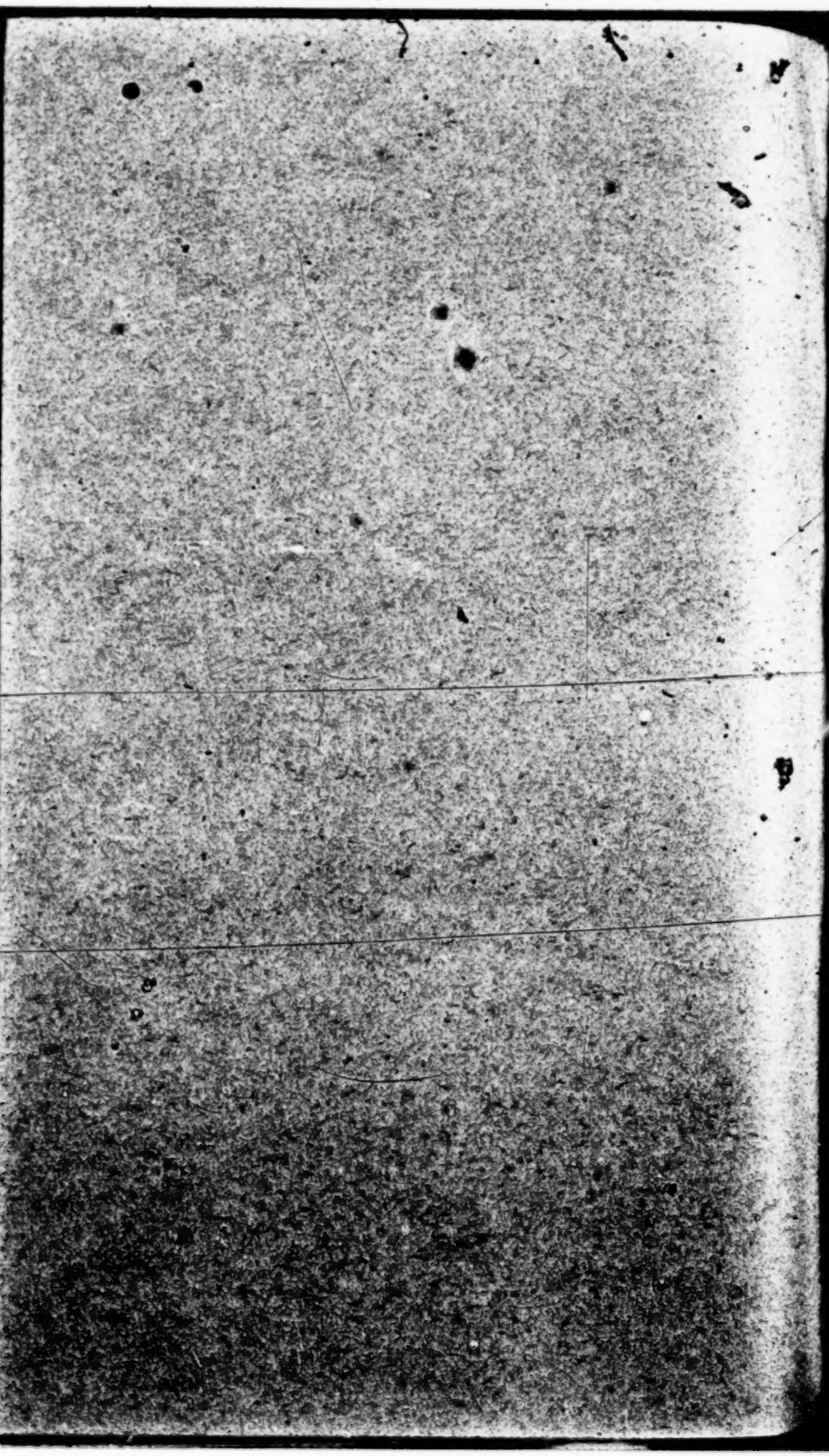
GREAT NORTHERN RAILWAY COMPANY,
APPELLANT,

vs.

STATE OF WASHINGTON

APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

FILED MARCH 30, 1936.



SUPREME COURT OF THE UNITED STATES

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APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

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[fol. 1]

IN SUPERIOR COURT OF THURSTON COUNTY

No. 14908

GREAT NORTHERN RAILWAY COMPANY, a Corporation,
Plaintiff,

vs.

STATE OF WASHINGTON, Defendant

[File endorsement omitted.]

AMENDED COMPLAINT—Filed March 9, 1934

Comes now the plaintiff above named and files this its amended complaint herein:

For its first cause of action against the defendant, plaintiff alleges:

I

At all times herein mentioned plaintiff was and now is a corporation duly organized and existing under and by virtue of the laws of the State of Minnesota. It has filed with the Secretary of State of the State of Washington a certified copy of its charter and a certified copy of each and all of its certificates of increase of capital stock, and a certificate of its appointment of a Resident Agent in the State of Washington to accept service of process, and has paid all annual license fees due the State of Washington, and complied with all the laws of said state relating to foreign corporations.

II

At all times herein mentioned plaintiff owned and operated and now owns and operates a transportation system of railway lines and branches, having its eastern termini at St. Paul and Duluth, in the State of Minnesota, and Superior in the State of Wisconsin, and extending westerly from said termini through the States of Minnesota, North Dakota, Montana, Idaho, Washington, Oregon and [fol. 2] California, with its western termini at Seattle and Tacoma, in the State of Washington, and Portland in the

State of Oregon. Said line of railroad was constructed more than thirty-five years ago, and is now, and for more than thirty-five years last past has been, a public utility devoted to and used for the transportation, as a common carrier, of passengers and freight, both intrastate and interstate, and for the transportation of mail, express, freight and passengers for the government of the United States, and has been, and is now, an instrumentality of interstate commerce and of the commerce of the government of the United States.

III

Chapter 117, Session Laws of the State of Washington, 1911, known as the "Public Service Commission Law", created an administrative tribunal called the Public Service Commission, with the usual powers of regulation and supervision of public utilities, including common carriers. Chapter 7, Session Laws 1921, known as the "Administrative Code", (Sections 10759 to 10898, inclusive, R. C. S.), created an administrative tribunal, known as the Department of Public Works, under the general supervision of a Director of Public Works. The functions of the Public Service Commission with respect to common carriers were transferred by Section 25, Chapter 7, Session Laws 1921 (Section 10783 R. C. S.) to the Director of Public Works.

IV

The Public Service Commission Law (Section 10344 R. C. S.) defines the terms used in the act.

Common carriers are defined as follows:

"All railroads, railroad companies, street railroads, street railroad companies, steamboat companies, express companies, car companies, sleeping car companies, freight companies, freight line companies and every corporation * * * operating * * * any such agency for public use in the conveyance of persons or property for hire within this state."

Public Service Companies are defined as follows:

"Every common carrier, gas company, electrical com-
[fol. 3] pany, water company, telephone company, telegraph company, wharfinger and warehouseman, as such terms are defined in this section."

V

The Public Service Commission Law as amended (Section 10416 R. C. S.) provides that "every public service company" shall make an annual report to the Commission, containing details of its corporate structure, capitalization, gross and net revenues, expenses, etc., said report to be filed at the office of the Department of Public Works in Olympia within three months after the close of the year for which the report is made. By Chapter 113, Session Laws 1921 (Section 10417 R. C. S.) the legislature amended the Public Service Commission Law to require every corporation "making and filing the annual statement required by Section 10416 R. C. S. to pay to the Director of Public Works a fee based on the gross operating revenues." For gross operating revenue between $5,000 and $10,000 the fee is $10.00, increasing gradually to a fee of $600 for revenue of five million dollars or over. By this act (Section 10418 R. C. S.) it is provided that all such sums collected by the Department of Public Works "shall within thirty days after their receipt be paid to the State Treasurer, and by him deposited in a fund to be known as the Public Service Revolving Fund." The same act, as later amended by Chapter 107, Session Laws 1923 (Section 10419 R. C. S., 1927 Supplement) prescribes a penalty of $25 for each day the fee remains unpaid, to be collected by the Department of Public Works in a civil action and deposited in the Public Service Revolving Fund of the State Treasury, and subjects the corporations "or the officers, agents or employes thereof" to prosecution for a misdemeanor.

VI

Chapter 107, Session Laws 1923 (Section 10417 R. C. S., 1927 Supplement), amended Chapter 113, Session Laws 1921 (Section 10417 R. C. S.) to require every corporation "regulated by or making and filing with the Department of [fol. 4] Public Works" the said annual statement, "except municipally owned or operated utilities", to pay an annual fee, increasing gradually from $5.00 for gross operating revenue of less than $5,000 to a fee of $1500 for revenue of six million dollars or over. The provisions for payment of the fees into the Revolving Fund and for penalties remained the same.

VII

Chapter 107, Session Laws 1929, again amended Chapter 113, Session Laws 1921, as amended by Chapter 107, Session Laws 1923, to require every "corporation engaged in business as a public utility and subject to regulation as to rates and charges by the Department of Public Works, except all transportation and steamboat companies holding certificates under Chapter 248 of the Laws of 1927," to file with the Department of Public Works, on or before the first day of April of each year, a sworn statement "showing its gross operating revenue for the preceding calendar year, and pay to the Department of Public Works a fee of 1/10 of 1% of such gross operating revenue." The provisions for payment of the fees into the Revolving Fund and for penalties again remained the same.

VIII

During the calendar year 1929 plaintiff's gross operating revenue for its entire system of railway, and from all other sources, including both interstate and intrastate business, and the transportation of mail, express, freight and passengers for the government of the United States, was the sum of $125,932,807.81. During said year plaintiff's gross operating revenue from traffic moving solely within the State of Washington, including transportation of mail, freight and passengers for the government of the United States, was $8,027,770.40. On March 31, 1930, in order to avoid the imposition of the penalties and criminal prosecu-
[fol. 5] tion as prescribed by said statutes, as alleged in paragraph V hereof, the plaintiff paid under protest to the Department of Public Works of the State of Washington the annual fee, amounting for the calendar year 1929 to $8027.77, imposed upon plaintiff by said Department under and by virtue of Chapter 107, Session Laws 1929.

IX

At the time plaintiff extended its line of railroad into the State of Washington, it complied and at all times since has complied with the laws of the state relating to foreign corporations doing business therein. Until 1897 no annual license fees were imposed by the State of Washington upon either domestic or foreign corporations doing business in

said state. By Chapter 70, Session Laws 1897, which remained in effect until 1907, an annual license fee of $10 was imposed upon every corporation having capital stock. Chapter 140, Session Laws 1907, which remained in effect until 1923, increased said annual license fee to $15. By Chapter 144, Session Laws 1923, every corporation having its articles of incorporation on file in the office of the Secretary of State, was required to pay an annual license fee in proportion to its authorized capital stock, increasing gradually from $15 for capital of $50,000 or less, to a fee of $150 for capital in excess of one million dollars, and up to and including two million dollars, and $1.00 for each one million dollars or fraction thereof of capital in excess of two million dollars. Said corporation license fee was again increased by Chapter 149 Laws Extraordinary Session 1925 (Section 3841 R. C. S. 1927 Supplement) by raising the fee on corporations having a capital stock above two million dollars from $1.00 to $10.00 for each one million dollars or fraction thereof, with a proviso that the total amount of such annual license fee should in no case exceed $3,000. Both by said Chapter 149, Laws Extraordinary Session 1925 and by Chapter 144, Session Laws 1923, it was provided "that the annual fee required to be paid [fol. 6] to the Department of Public Works by any public service company shall be deducted from the annual fee provided herein, and the excess only shall be collected under this act." On May 8, 1928, the Supreme Court of the State of Washington in the case of Great Northern Railway Company v. State of Washington, reported in 147 Wash. Reports, page 630, held Chapter 149, Laws Extraordinary 1925, unconstitutional and void as to Railway Companies doing both a local and an interstate business.

Thereupon, the legislature passed Chapter 227, Session Laws 1929, which provides in section 4 thereof, that "every corporation organized under the laws of this state, except the corporations for which existing law provides a different fee schedule, shall pay, on or before the first day of July of each and every year to the Secretary of State, for the use of the state, an annual fee of $15 for the first $50,000 or less of its authorized capital stock, and 1/40 of 1% additional on all amounts in excess of $50,000, and not exceeding one million dollars, and 1/100 of 1% additional on all amounts in excess of one million dollars, and not

exceeding four million dollars, and 1/200 of 1% additional on all amounts in excess of four million dollars, but in no case shall an annual license-fee exceed the sum of $1250," and in Section 5 thereof: "All foreign corporations doing intrastate business, or hereafter seeking to do intrastate business in this state, shall pay for the privilege of doing such intrastate business in this state, the same fees as are prescribed for domestic corporations for annual license fees in the preceding section, such fees to be computed upon the proportion of the capital stock represented or to be represented by its property and business in this state, to be ascertained by comparing the entire volume of business with the volume of intrastate business in this state."

It is also provided in Section 8 of Chapter 227, Session [fol. 7] Laws of 1929, "that the annual fee required to be paid to the Department of Public Works by any Public service company, shall be deducted from the annual license fee provided herein, and the excess only shall be collected."

X

By Section 3842 of Remington's Compiled Statutes of Washington it is provided that "no corporation shall be permitted to commence or maintain any suit, action or proceeding in any court of this state without alleging and proving that it has paid its annual license fee last due." By the same section it is provided that "failure upon the part of any corporation to pay its annual license fee for the period of one year from and after the date when such payment first became due, shall be prima facie evidence of the insolvency of such corporation, and the fact of such insolvency may be shown by the state or by any private person or corporation." By said section it is further provided that "it shall be the duty of the Secretary of State to strike from the records of its office the names of all corporations which have neglected for a period of two years to pay their annual license fees, and any corporation thereafter organized may take and shall have the exclusive right to use the corporate name of any corporation so stricken from the records."

By Section 3843, Remington's Compiled Statutes, as amended by Chapter 144, Section 5 of the Session Laws of 1923, and subsequent sections, it is provided that every

corporation whose name has been stricken from the records of the office of the Secretary of State for failure to pay its annual license fee for two years may be reinstated at any time within three years after its name has been stricken from the record by paying to the Secretary of State, for the use of the State, all license fees and penalties then due from it, and the additional sum of $10 for each and every year that its name has been stricken from the records, but [fol. 8] that, if, within the period named, such corporation shall not have made such application, the Secretary of State shall enter upon his records a notation that such corporation is dissolved, and that it shall thereafter be dissolved, and the trustees of such corporation shall hold the title to its property for the benefit of its stockholders and creditors, to be disposed of under appropriate court proceedings. It is also provided by said Section 3842 of Remington's Compiled Statutes that the State Board of Tax Commissioners may institute suits to enforce the payment of any license fee due from any corporation under the above mentioned laws.

If Chapter 107, Session Laws of 1929 and Chapter 107, Session Laws of 1923, should both be held unconstitutional and void as to the plaintiff herein, then the plaintiff will be required to pay to the Secretary of State the annual license fee imposed by said Chapter 227, Session Laws of 1929, or be liable to the infliction of the penalties, and to be deprived of the rights and privileges as provided by the aforesaid statutes.

XI

At all times herein mentioned plaintiff's authorized capital stock was, and is now, the sum of two hundred fifty million dollars. During the year 1929 the volume of plaintiff's intrastate business in the State of Washington was 6.375% of the volume of business done by plaintiff on its entire system. Using the formula provided in Section 5, Chapter 227, Session Laws 1929, plaintiff's annual license fee due the Secretary of State July 1, 1930, would be computed upon 6.375% of its authorized capital stock, which would make plaintiff's authorized capital stock allocated to the State of Washington, $15,937,500. Applying the rates named in said statute, plaintiff's annual license fee due July 1, 1930, amounted to the sum of $1149.38, as shown [fol. 9] by the following computation:

Capital Stock Allocated to Washington under Chapter 227, Session Laws 1929.		Amount of Fees
From 0 to $50,000	$50,000	$15.00
From 50,001 to 1,000,000	950,000	237.50
From 1,000,001 to 4,000,000	3,000,000	300.00
In Excess of 4,000,000	11,937,500	596.88
Total	$15,937,500	$1,149.38

Since said annual license fee, amounting to $1,149.38, payable July 1, 1930 to the Secretary of State, under Chapter 227, Session Laws 1929, was less than the annual fee paid to the Department of Public Works on March 31, 1930, under the provisions of Section 8, Chapter 227 Session Laws 1929 there was no fee due, and none was paid to the Secretary of State. If Chapter 107, Session Laws 1929, should be held unconstitutional and void as to the plaintiff herein, then there was due the Department of Public Works under Chapter 107, Session Laws 1923, an annual gross operating license fee of $1500, and since the annual license fee due July 1, 1930 to the Secretary of State under Chapter 227 Session Laws 1929, was less than said annual gross operating license fee due the Department of Public Works on March 31, 1930, under said Chapter 107 Session Laws 1923, under the provisions of Section 8 of said Chapter 227 Session Laws 1929, there was no fee due the Secretary of State. If Chapter 107 Session Laws 1929 and Chapter 107 Session Laws 1923 should both be held unconstitutional and void as to the plaintiff herein, then there was due the Secretary of State under Chapter 227 Session Laws 1929, the annual license fee payable to the Secretary of State July 1, 1930, computed as hereinabove set forth, and amounting to the sum of $1149.38, less the fee of $600 payable to the Department of Public Works under Chapter 113 Session Laws 1921, unless said Chapter 227 Session Laws 1929 [fol. 10] should also be held unconstitutional and void. In the event the last mentioned statute should also be held unconstitutional and void as to the plaintiff herein, then there was due the Department of Public Works under Chapter 113 Session Laws 1921, an annual gross operating license fee of $600, unless said Chapter 113 Session Laws 1921 should also be held unconstitutional and void.

XII

For the privilege of doing an intrastate business in the State of Washington, Chapter 107 Session Laws 1929, purports to levy a tax computed upon a percentage of, and Chapters 107 Session Laws 1923 and 113 Session Laws 1921, purport to levy a graduated tax computed solely upon, the annual gross operating revenue of the plaintiff from all sources. Under the provisions of all of said statutes the tax is computed upon revenue derived from both interstate and intrastate commerce, from property located outside the State of Washington, and from the transportation of mail, express, freight and passengers for the government of the United States. The Department of Public Works has interpreted Chapter 107 Session Laws 1929, as excluding from the gross operating revenues upon which the tax is imposed, all revenues derived from interstate commerce and from property located outside of the state of Washington, and has computed the tax upon revenue derived from business done solely within the State of Washington, but including therein revenue derived from transportation within the State of Washington of mail, express, freight and passengers for the United States Government.

Chapter 227 Session Laws 1929, purports to levy a tax for the privilege of doing an intrastate business in the State of Washington, computed upon the proportion of the capital stock represented or to be represented by its property and business in this state, to be ascertained by com- [fol. 11] paring the entire volume of business done by plaintiff during any calendar year, including revenues derived from both interstate and intrastate commerce, from property located outside the State of Washington and from the transportation of mail, express, freight and passengers for the United States Government, with the volume of intrastate business in this state, including the transportation of mail, express, freight and passengers within the State of Washington for the government of the United States.

XIII

Plaintiff built and equipped its line of railroad in the State of Washington more than thirty-five years ago and before said Chapter 113 Session Laws of 1921, Chapter 107

Session Laws of 1923 and Chapters 107 and 227 Session Laws of 1929, or any of them, were enacted, and had expended more than one hundred million dollars therefor. It then commenced, and ever since has carried on both interstate and intrastate commerce in said state. In 1905, long after plaintiff had constructed and equipped its line of railroad in this state there was enacted Chapter 81 Session Laws of 1905, entitled, "An Act to Establish a Railroad Commission for the State of Washington", etc., followed in 1911 by the enactment of the Public Service Commission Law, mentioned in Paragraph III hereof. By the Constitution of the State of Washington and said statutes and acts amendatory of said statutes and supplemental thereto, and by the Acts of Congress regulating interstate commerce, particularly Section 1 (18)-(21), Section 13, Section 15a and Section 19a thereof, there is imposed upon plaintiff an obligation to devote its property to the service of the people of said state in intrastate transportation, from which it cannot withdraw and at the same time continue to carry on its business as a common carrier in interstate commerce. Plaintiff's investment, prior to the enactment of said laws, was made to provide adequate facilities for the handling of both interstate and intrastate commerce, and a [fol. 12] substantial part thereof was made by order of the Railroad Commission of Washington, and its successors, the Public Service Commission and Department of Public Works for the purpose of equipping its property to comply with said Public Service Commission law. Plaintiff's railroad system comprises approximately 10,541 miles of track, of which approximately 1450 miles are in the State of Washington. It is taxed in the State of Washington pursuant to Chapter 130 Laws Special Session of 1925, at its fair market value, considered as a going concern, including all of its property, real, personal and mixed, and all of its rights and franchises of every kind and nature whatsoever. Said acts, including said Chapter 107 Session Laws of 1929, do not levy a property tax in lieu of all other taxation, for the reason that plaintiff's property is fully taxed on an ad valorem basis, as aforesaid. Plaintiff's gross operating revenue for business done in the State of Washington for the year 1929 was the sum of $17,549,476.00, of which $8,027,770.40 was from intrastate and $9,521,706.00 from interstate commerce. Both classes of business were and are

carried by plaintiff in the same trains, operated by the same employes, over the same lines of railroad, and are inextricably commingled, so that it is not and was not possible, practically and economically, or at all, to carry interstate commerce separately from intrastate commerce in different trains, or by means of different instrumentalities or employes, or on different lines. It was not and is not, as a practical matter, or at all, possible for plaintiff to withdraw from its intrastate commerce and continue its interstate commerce. The taxes imposed on plaintiff by said Chapter 113 Session Laws 1921, Chapter 107 Session Laws 1923 and Chapters 107 and 227 Session Laws of 1929, and each of them, whether viewed as taxes or fees for the privilege of doing intrastate business in the State of Washington or otherwise, are in truth and in fact fees or taxes exacted for the privilege of doing interstate business in this state as a [fol. 13] common carrier by railroad, and for the privilege of transporting mail, express, freight and passengers for the government of the United States, and are fees or taxes which plaintiff cannot avoid by withdrawing its property from use in intrastate commerce, either under the State Constitution, said Public Service Commission Law of the State of Washington, under the acts of Congress regulating interstate commerce, or as a practical matter, or at all, and said fees so exacted by said laws, and each of them, constitute a burden upon interstate commerce, and upon an agency devoted thereto, and said laws, and each of them are in violation of Section 8, Article 1 of the Constitution of the United States, of the acts of Congress regulating interstate commerce, and of the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States, and are null and void.

XIV

Plaintiff's authorized capital of $250,000,000 is invested in and represents the property and railway lines of the plaintiff located in the States of Minnesota, Wisconsin, Iowa, North Dakota, South Dakota, Montana, Idaho, Oregon and California, and in the Dominion of Canada, as well as in the State of Washington, and other property and securities in other companies, not included in its said system of transportation, substantially all of which property and securities in other companies are located outside the

State of Washington, and have a value of over Two Hundred Million Dollars. Plaintiff's line of railroad, of which plaintiff's railroad in the State of Washington is a component part, has a value of several hundred million dollars. In the year 1929 the full true cash value of plaintiff's operating property in the State of Washington for taxation purposes, as fixed by the Tax Commission of said state as provided by statute, was the sum of $81,000,000, and the equalized value as determined by the State Equalization Committee in accordance with the statutes in such cases made and provided, upon which value general taxes were levied and assessed against the plaintiff's property within the State of Washington for the year 1929, was the sum [fol. 14] of $35,356,975.00. If the statutes of the State of Washington and of the United States permitted the plaintiff to withdraw from intrastate commerce in said state while still continuing its functions of a common carrier of interstate commerce therein, its very large property investment in the State of Washington, and the present or future public convenience and necessity would not permit plaintiff, as a practical matter, to discontinue its said intrastate business. If the Constitution and statutes of the State of Washington permitted the plaintiff to withdraw from intrastate commerce in said state, it could not withdraw therefrom under the statutes of the United States.

XV

Under the Public Service Commission Law (Chapter 117, Session Laws 1911, Sections 10339 to 10490, inclusive, R. C. S. as amended) and under other laws of this state, the Department of Public Works exercises jurisdiction over and supervision of many classes of public utilities, including common carriers by rail, railroads operated by electricity, street railways, gas, electrical and water companies, telegraph and telephone companies, wharfingers and warehousemen, carriers by water, and many other activities wholly disconnected from and unrelated to its duties of inspection and supervision of common carriers by railroad, and is charged with the performance of a variety of duties, other than those pertaining to inspection and supervision of common carriers by railroad under the police power of the state. If Chapter 113, Session Laws of 1921, Chapter 107, Session Laws of 1923, and Chapter 107, Session Laws

of 1929, or any of them, be construed as imposing a fee for supervision and inspection, then said statutes, and each of them, do not restrict the fee to be held by plaintiff or other common carriers by rail, to the cost of legitimate regulation or supervision, nor is such fee based upon the proper cost or expense thereof, but the same is a flat fee of a percentage of gross revenue levied upon carriers by rail, and other corporations, for the purpose of paying the expense of supervising and inspecting a variety of inde- [fol. 15] pendent and unrelated corporations, as above alleged, and for the purpose of paying the expense of performance of a variety of unrelated duties, including the expense of performing duties and discharging functions which properly pertain to inspection, supervision and regulation, and many expenses of performing duties and discharging functions, such as business and policing expenses, the expense whereof cannot be imposed upon common carriers by rail, including plaintiff, as legitimate expenses of supervising, inspecting and regulating such common carriers by rail. The fee or tax provided by said Chapter 107, Session Laws of 1929, and the other statutes hereinbefore mentioned, is grossly in excess of the reasonable cost of inspection and supervision of common carriers by rail. Plaintiff is informed and believes, and alleges that there has been accumulated from the fees paid under said acts, up to and including the first of January, 1933, the sum of more than $250,000 in excess of the amount expended by the Department of Public Works in the discharge of its manifold duties and functions under the laws of this state. Said fee or tax is not a reasonable or legitimate inspection or supervision fee or tax, but said statutes, and each of them, are in truth and in fact, revenue measures. The taxes imposed by and under said statutes are made payable into the public service revolving fund, which fund is a general state fund, subject to withdrawal for various and sundry expenses of the state, and not solely devoted by law to the expense incurred by the Department of Public Works in the performance of its duties of inspection or supervision of common carriers by rail, or other corporations or businesses subject to its jurisdiction. Said fee or tax, if construed to be a supervision or inspection fee or tax, is, and constitutes a burden on, and regulation of, interstate commerce in violation of Section 8, Article 1 of the Constitu-

tion of the United States, is capricious, arbitrary, excessive and unreasonable, and is discriminatory and unequal, denies to plaintiff the equal protection of the laws, and deprives plaintiff of its property without due process of law, in violation of the Fourteenth Amendment to the Constitu-
[fol. 16] tion of the United States and Article I, Sections 3 and 12 and Article VII, Sections 1, 2 and 3 of the State Constitution.

XVI

Chapter 113, Session Laws 1921, Chapter 107, Session Laws 1923, Chapters 107 and 227, Session Laws 1929, and each and all of said acts, are unconstitutional, and the taxes imposed thereunder are unlawful, null and void for the following reasons:

(a) If said acts are interpreted as imposing a fee for regulation and inspection purposes, the fees imposed are unreasonable and disproportionate to the services rendered, and said statutes were not enacted in good faith for regulation and inspection purposes, but were in truth and in fact enacted, at least in part, for revenue purposes, but, whether said acts impose a tax for revenue purposes or for regulation and inspection purposes, said acts are in violation of Section 8, Article I of the Constitution of the United States, in that they impose a tax on plaintiff's property devoted to commerce among the states and with foreign nations and a tax on such commerce.

(b) If said acts are construed as imposing a tax to defray the expense of regulating and inspecting the public utilities named therein, said tax is a direct burden upon and a regulation of interstate commerce, in violation of Section 8, Article I of the Constitution of the United States, denies plaintiff and other similar corporations equal protection of the laws and deprives plaintiff of its property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States and Article I, Sections 3 and 12 and Article VII, Sections 1, 2 and 3 of the State Constitution, in that said tax is imposed by said statutes, at least in part, for the purpose of regulating and inspecting other public utilities in no way related to or connected with the business of operating a common carrier railway, and for the purpose of defraying the expense

of performing functions and furnishing services entirely disconnected from the regulation of railroads, and for the [fol. 17] further purpose of regulating and supervising interstate services, facilities and rates of railroads engaged in interstate commerce, which tax plaintiff and other similar corporations cannot avoid by withdrawing from intrastate commerce in this state.

(c) If said acts are interpreted as imposing a fee for regulation and inspection purposes, then, while plaintiff and all other residents of this state and all other corporations doing business therein, are taxed upon their property within the state on an ad valorem basis, plaintiff and other similar corporations are also taxed under said statutes to defray the expense of regulating and inspecting disconnected and unrelated public utilities, although said statutes do not impose said tax upon all residents of the state and upon all corporations doing business therein, and thus said statutes deny to plaintiff and other similar corporations the equal protection of the laws, and deprive them of their property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States and Article I, Sections 3 and 12 and Article VII, Sections 1, 2 and 3 of the State Constitution.

(d) Plaintiff is informed and believes, and therefore alleges that a large portion of the funds collected under said acts has been used to defray the expenses of the Department of Public Works in proceedings before the Interstate Commerce Commission, in connection with interstate rates, services and facilities. In many of such proceedings the parties directly interested and benefited by the services performed by said Department before the Interstate Commerce Commission are shippers and corporations engaged in business in this state, which are not taxed under said statutes, or at all, for said purposes. To impose said tax upon plaintiff and similar corporations and expend said funds for said purposes amounts to a regulation of interstate commerce, in violation of Section 8, Article I of the Constitution of the United States, and denies plain-[fol. 18] tiff and other similar corporations the equal protection of the laws, and deprives them of their property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States, and

Article I, Sections 3 and 12 and Article VII, Sections 1, 2 and 3 of the State Constitution.

(e) Plaintiff is informed and believes, and therefore alleges that the funds collected and expended under said acts, and the cost of regulation and inspection of railroads, have been so intermingled with the cost of regulating and inspecting disconnected and unrelated public utilities, and with the cost of performing services entirely outside of the sphere of the state's acknowledged authority, such as the cost of proceedings before the Interstate Commerce Commission with respect to interstate rates, services and facilities, and that the fees collected have exceeded the cost of regulation and inspection of plaintiff and other similar railroad corporations by such a large sum that the tax imposed by said statutes is unreasonable and disproportionate to the services rendered, and so obstructs the freedom of interstate commerce as to amount to a regulation thereof, in violation of Section 8, Article I of the Constitution of the United States, and denies plaintiff the equal protection of the laws and deprives it of its property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States and Article I, Sections 3 and 12, and Article VII, Sections 1, 2 and 3 of the State Constitution.

(f) Said acts operate to tax the property of the plaintiff in other states having no taxable situs in Washington, and thus deprive plaintiff of its property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States.

(g) Said acts tax domestic corporations in proportion to their capital and property within the State of Washington alone, and therefore discriminate against the plaintiff and other similar foreign corporations by taxing them on all [fol. 19] of their property, wherever located, and thus deny to them the equal protection of the laws, in violation of the Fourteenth Amendment to the Constitution of the United States.

(h) Said acts levy a tax upon revenues derived from the transportation of the mails, passengers, freight and express for the government of the United States, and thereby impose a burden upon and interfere with the exercise of

governmental powers of the Federal Government, which the constitution of the United States contemplates shall be supreme and independent of state supervision or regulation.

XVII

The exaction from the plaintiff by the defendant of said tax of $8027.77, or of any tax or license fee imposed by said statutes or any of them, was and is contrary to the Constitution of the United States and the Fourteenth Amendment thereto, as hereinabove alleged.

For a second cause of action against the defendant, plaintiff alleges:

I

Plaintiff hereby adopts and realleges Paragraphs I to VII, inclusive, of its first cause of action herein, as Paragraphs I to VII, inclusive, of this, its second cause of action.

VIII

During the calendar year 1930 plaintiff's gross operating revenue for its entire system of railway, and from all other sources, including both interstate and intrastate business and the transportation of mail, express, freight and passengers for the government of the United States, was $104,996,076.26. During said year plaintiff's gross operating revenue from traffic moving solely within the State of Washington, including transportation of mail, freight and passengers for the government of the United States, [fol. 20] was $7,267,082.52. On March 26, 1931, in order to avoid the imposition of the penalties and criminal prosecution, as prescribed by said statutes as alleged in Paragraph V hereof, the plaintiff paid under protest to the Department of Public Works of the State of Washington, the annual fee, amounting for the calendar year 1930, to $7,267.08, imposed upon plaintiff by said Department under and by virtue of Chapter 107, Session Laws of 1929.

IX

Plaintiff hereby adopts and realleges Paragraph IX of its first cause of action as Paragraph IX of this, its second cause of action.

X

Plaintiff hereby adopts and realleges Paragraph X of its first cause of action herein as Paragraph X of this, its second cause of action.

XI

At all times herein mentioned plaintiff's authorized capital stock was and is now the sum of $250,000,000. During the year 1930 the volume of plaintiff's intrastate business in the State of Washington was 6.921% of the volume of business done by plaintiff on its entire system. Using the formula provided in Section 5, Chapter 227, Session Laws of 1929, plaintiff's annual license fee due the Secretary of State July 1, 1931, would be computed upon 6.921% of its capital stock allocated to the State of Washington, which would make plaintiff's authorized capital stock allocated to the State of Washington $17,302,500.00. Applying the rates named in said statute, plaintiff's annual license fee due July 1, 1931, amounted to the sum of $1217.63, as shown by the following computation:

[fol. 21]

Capital Stock Allocated to Washington under Chapter 227, Session Laws 1929		Amount of Fees
From 0 to $50,000	$50,000	$15.00
From 50,001 to 1,000,000	950,000	237.50
From 1,000,001 to 4,000,000	3,000,000	300.00
In Excess of 4,000,000	13,302,500	665.13
Total	$17,302,500	$1,217.63

Since said annual license fee, amounting to $1,217.63, payable July 1, 1931 to the Secretary of State, under Chapter 227, Session Laws 1929, was less than the annual fee paid to the Department of Public Works on March 26, 1931, under the provisions of Section 8, Chapter 227, Session Laws 1929, there was no fee due, and none was paid to the Secretary of State. If Chapter 107, Session Laws 1929, should be held unconstitutional and void as to the plaintiff herein, then there was due the Department of Public Works under Chapter 107, Session Laws 1923, an annual gross operating license fee of $1,500, and since the annual license fee due July 1, 1931 to the Secretary of State under Chap-

ter 227, Session Laws 1929, was less than said annual gross operating license fee due the Department of Public Works on March 26, 1931, under said Chapter 107, Session Laws 1923, under the provisions of Section 8 of said Chapter 227, Session Laws 1929 there was no fee due the Secretary of State. If Chapter 107, Session Laws 1929 and Chapter 107, Session Laws 1923, should both be held unconstitutional and void as to the plaintiff herein, then there was due the Secretary of State under Chapter 227, Session Laws 1929, the annual license fee payable to the Secretary of State July 1, 1931, computed as hereinabove set forth, and amounting to the sum of $1,217.63, less the fee of $600 payable to the Department of Public Works under Chapter 113, Session Laws 1921, unless said Chapter 227, Session Laws 1929, should also be held unconstitutional and void. In the [fol. 22] event the last mentioned statute should also be held unconstitutional and void as to the plaintiff herein, then there was due the Department of Public Works under Chapter 113, Session Laws 1921, an annual gross license fee of $600, unless said Chapter 113, Session Laws 1921, should also be held unconstitutional and void.

XII

Plaintiff hereby adopts and realleges paragraph XII of its first cause of action herein as paragraph XII of this, its second cause of action.

XIII

Plaintiff built and equipped its line of railroad in the State of Washington more than thirty-five years ago and before said Chapter 113, Session Laws of 1921, Chapter 107 Session Laws of 1923 and Chapters 107 and 227 Session Laws of 1929, or any of them, were enacted, and has expended more than one hundred million dollars therefor. It then commenced, and ever since has carried on both interstate and intrastate commerce in said state. In 1905, long after plaintiff had constructed and equipped its line of railroad in this state there was enacted Chapter 81 Session Laws of 1905, entitled, "An Act to Establish a Railroad Commission for the State of Washington", etc., followed in 1911 by the enactment of the Public Service Commission Law, mentioned in Paragraph III hereof. By the Consti-

tution of the State of Washington and said statutes and acts amendatory of said statutes and supplemental thereto, and by the Acts of Congress regulating interstate commerce, particularly Section 1 (18)-(21), Section 13, Section 15a and Section 19a thereof, there is imposed upon plaintiff an obligation to devote its property to the service of the people of said state in intrastate transportation, from which it cannot withdraw and at the same time continue to carry on its business as a common carrier in interstate commerce. Plaintiff's investment, prior to the enactment of said laws, was made to provide adequate facilities for the handling of [fol. 23] both interstate and intrastate commerce, and a substantial part thereof was made by order of the Railroad Commission of Washington, and its successors, the Public Service Commission and Department of Public Works for the purpose of equipping its property to comply with said Public Service Commission law. Plaintiff's railroad system comprises approximately 10,541 miles of track, of which approximately 1,450 miles are in the State of Washington. It is taxed in the State of Washington pursuant to Chapter 130 Laws Special Session of 1925, at its fair market value, considered as a going concern, including all of its property, real, personal and mixed and all of its rights and franchises of every kind and nature whatsoever. Said acts, including said Chapter 107 Session Laws of 1929, do not levy a property tax in lieu of all other taxation, for the reason that plaintiff's property is fully taxed on an ad valorem basis, as aforesaid. Plaintiff's gross operating revenue for business done in the State of Washington for the year 1930 was the sum of $15,372,894.52, of which $7,267,082.52 was from intrastate and $8,105,812.00 from interstate commerce. Both classes of business were and are carried by plaintiff in the same trains, operated by the same employes, over the same lines of railroad, and are inextricably commingled, so that it is not and was not possible, practically and economically, or at all, to carry interstate commerce separately from intrastate commerce in different trains, or by means of different instrumentalities or employes, or on different lines. It was not and is not, as a practical matter, or at all, possible for plaintiff to withdraw from its intrastate commerce and continue its interstate commerce.

The taxes imposed on plaintiff by said Chapter 113 Session Laws 1921, Chapter 107 Session Laws 1923 and Chapters 107 and 227 Session Laws of 1929, and each of them, whether viewed as taxes or fees for the privilege of doing intrastate business in the State of Washington or otherwise, are in truth and in fact fees or taxes exacted for the privilege of doing interstate business in this state as a common carrier by railroad, and for the privilege of transport- [fol. 24] ing mail, express, freight and passengers for the government of the United States, and are fees or taxes which plaintiff cannot avoid by withdrawing its property from use in intrastate commerce, either under the State Constitution, said Public Service Commission Law of the State of Washington, under the acts of Congress regulating interstate commerce, or as a practical matter, or at all, and said fees so exacted by said laws, and each of them constitute a burden upon interstate commerce, and upon an agency devoted thereto, and said laws, and each of them are in violation of Section 8, Article 1 of the Constitution of the United States, of the acts of Congress regulating interstate commerce, and of the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States, and are null and void.

XIV

Plaintiff's authorized capital of $250,000,000 is invested in and represents the property and railway lines of the plaintiff located in the States of Minnesota, Wisconsin, Iowa, North Dakota, South Dakota, Montana, Idaho, Oregon and California, and in the Dominion of Canada, as well as in the State of Washington, and other property and securities in other companies, not included in its said system of transportation, substantially all of which property and securities in other companies are located outside the State of Washington, and have a value of over Two Hundred Million Dollars. Plaintiff's line of railroad, of which plaintiff's railroad in the State of Washington is a component part, has a value of several hundred million dollars. In the year 1930 the full true cash value of plaintiff's operating property in the State of Washington for taxation purposes, as fixed by the Tax Commission of said state as provided by statute was the sum of $81,000,000, and the equalized value

as determined by the State Equalization Committee in accordance with the statutes in such cases made and provided, [fol. 25] upon which value general taxes were levied and assessed against the plaintiff's property within the State of Washington for the year 1930, was the sum of $35,381,092.00. If the statutes of the State of Washington and of the United States permitted the plaintiff to withdraw from intrastate commerce in said state while still continuing its functions of a common carrier of interstate commerce therein, its very large property investment in the State of Washington, and the present or future public convenience and necessity would not permit plaintiff, as a practical matter, to discontinue its said intrastate business. If the Constitution and statutes of the State of Washington permitted the plaintiff to withdraw from intrastate commerce in said state, it could not withdraw therefrom under the statutes of the United States.

XV

Plaintiff hereby adopts and realleges Paragraph XV of its first cause of action herein as paragraph XV of this, its second cause of action.

XVI

Plaintiff hereby adopts and realleges Paragraph XVI of its first cause of action herein, as paragraph XVI of this, its second cause of action.

XVII

The exaction from the plaintiff by the defendant of said tax of $7,267.08, or of any tax or license fee imposed by said statutes or any of them, was and is contrary to the Constitution of the United States and the Fourteenth Amendment thereto, as hereinabove alleged.

For a third cause of action against the defendant, plaintiff alleges:

I

Plaintiff hereby adopts and realleges Paragraphs I to VII, inclusive, of its first cause of action herein, as Paragraphs I to VII, inclusive, of this, its third cause of action.

VIII

During the calendar year 1931 paintiff's gross operating revenue for its entire system of railway, and from all other [fol. 26] sources, including both interstate and intrastate business and the transportation of mail, express, freight and passengers for the government of the United States, was the sum of $77,087,454.70. During said year plaintiff's gross operating revenue from traffic moving solely within the State of Washington, including transportation of mail, freight and passengers for the government of the United States was $5,528,981.62. On March 29, 1932, in order to avoid the imposition of the penalties and criminal prosecution, as prescribed by said statutes, as alleged in Paragraph V hereof, the plaintiff paid under protest to the Department of Public Works of the State of Washington the annual fee, amounting for the calendar year 1931, to $5,528.98, imposed upon plaintiff by said Department under and by virtue of Chapter 107 Session Laws 1929.

IX

Plaintiff hereby adopts and realleges Paragraph IX of its first cause of action herein, as paragraph IX of this, its third cause of action.

X

Plaintiff hereby adopts and realleges Paragraph X of its first cause of action herein, as paragraph X of this, its third cause of action.

XI

At all times herein mentioned plaintiff's authorized capital stock was, and is now, the sum of $250,000,000. During the year 1931 the volume of plaintiff's intrastate business in the State of Washington was 7.172% of the volume of business done by plaintiff on its entire system. Using the formula provided in Section 5, Chapter 227 Session Laws of 1929, plaintiff's annual license fee due the Secretary of State July 1, 1932 would be computed upon 7.172% of its authorized capital stock, which would make plaintiff's authorized capital stock allocated to the State of Wasington, $17,930,000.00. Applying the rates named in said statute,

plaintiff's annual license fee due July 1, 1932, amounted to the sum of $1249.00, as shown by the following computation:

[fol. 27]

Capital Stock Allocated to Washington under Chapter 227, Session Laws 1929		Amount of Fees
From 0 to $50,000	$50,000	$15.00
From 50,001 to 1,000,000	950,000	237.50
From 1,000,001 to 4,000,000	3,000,000	300.00
In Excess of 4,000,000	13,930,000	696.50
Total	$17,930,000	$1249.00

Since said annual license fee, amounting to $1249.00, payable July 1, 1832 to the Secretary of State, under Chapter 227, Session Laws 1929, was less than the annual fee paid to the Department of Public Works on March 29, 1932, under the provisions of Section 8, Chapter 227, Session Laws 1929, there was no fee due, and none was paid to the Secretary of State. If Chapter 107, Session Laws of 1929, should be held unconstitutional and void as to the plaintiff herein, then there was due the Department of Public Works under Chapter 107, Session Laws 1923, an annual gross operating license fee of $1500, and since the annual license fee due July 1, 1932, to the Secretary of State under Chapter 227, Session Laws 1929, was less than said annual gross operating license fee due the Department of Public Works on March 29, 1932, under said Chapter 107, Session Laws 1923, under the provisions of Section 8 of said Chapter 227, Session Laws 1929 there was no fee due the Secretary of State. If Chapter 107 Session Laws 1929 and Chapter 107, Session Laws 1923, should both be held unconstitutional and void as to the plaintiff herein, then there was due the Secretary of State under Chapter 227, Session Laws 1929, the annual license fee payable to the Secretary of State July 1, 1932, computed as hereinabove set forth, and amounting to the sum of $1249.00, less the fee of $600 payable to the Department of Public Works under Chapter 113, Session Laws 1921, unless said Chapter 227, Session Laws 1929, should also be held unconstitutional and void. In the event the last mentioned statute should also be held unconstitutional and [fol. 28] void as to the plaintiff herein, then there was due the Department of Public Works under Chapter 113, Ses-

sion Laws 1921, an annual gross license fee of $600, unless said Chapter 113, Session Laws 1921, should also be held unconstitutional and void.

XII

Plaintiff hereby adopts and realleges paragraph XII of its first cause of action herein, as paragraph XII of this, its third cause of action.

XIII

Plaintiff built and equipped its line of railroad in the State of Washington more than thirty-five years ago and before said Chapter 113 Session Laws of 1921, Chapter 107 Session Laws of 1923 and Chapters 107 and 227 Session Laws of 1929, or any of them, were enacted, and has expended more than one hundred million dollars therefor. It then commenced, and ever since has carried on both interstate and intrastate commerce in said state. In 1905, long after plaintiff had constructed and equipped its line of railroad in this state there was enacted Chapter 81 Session Laws of 1905, entitled, "An Act to Establish a Railroad Commission for the State of Washington", etc., followed in 1911 by the enactment of the Public Service Commission Law, mentioned in Paragraph III hereof. By the Constitution of the State of Washington and said statutes and acts amendatory of said statutes and supplemental thereto, and by the Acts of Congress regulating interstate commerce, particularly Section 1 (18)-(21), Section 13, Section 15a and Section 19a thereof, there is imposed upon plaintiff an obligation to devote its property to the service of the people of said state in intrastate transportation, from which it cannot withdraw and at the same time continue to carry on its business as a common carrier in interstate commerce. Plaintiff's investment, prior to the enactment of said laws, was made to provide adequate facilities for the handling of both interstate and intrastate commerce, and a substantial part thereof was made by order of the Railroad Commission of [fol. 29] Washington, and its successors, the Public Service Commission and Department of Public Works for the purpose of equipping its property to comply with said Public Service Commission law. Plaintiff's railroad system comprises approximately 10,541 miles, of which approximately

1450 miles are in the State of Washington. It is taxed in the State of Washington pursuant to Chapter 130 Laws Special Session of 1925, at its fair market value, considered as a going concern, including all of its property, real, personal and mixed, and all of its rights and franchises of every kind and nature whatsoever. Said acts, including said Chapter 107 Session Laws of 1929, do not levy a property tax in lieu of all other taxation, for the reason that plaintiff's property is fully taxed on an ad valorem basis, as aforesaid. Plaintiff's gross operating revenue for business done in the State of Washington for the year 1931 was the sum of $11,778,584.62, of which $5,528,981.62 was from intrastate commerce and $6,249,603.00 from interstate commerce. Both classes of business were and are carried by plaintiff in the same trains, operated by the same employes, over the same lines of railroad, and are inextricably commingled, so that it is not and was not possible, practically and economically, or at all, to carry interstate commerce separately from intrastate commerce in different trains, or by means of different instrumentalities or employes, or on different lines. It was not and is not, as a practical matter, or at all, possible for plaintiff to withdraw from its intrastate commerce and continue its interstate commerce. The taxes imposed on plaintiff by said Chapter 113, Session Laws 1921, Chapter 107 Session Laws 1923 and Chapters 107 and 227 Session Laws of 1929, and each of them, whether viewed as taxes or fees for the privilege of doing intrastate business in the State of Washington or otherwise, are in truth and in fact fees or taxes exacted for the privilege of doing interstate business in this state as a common carrier by railroad, and for the privilege of transporting [fol. 30] mail, express, freight and passengers for the government of the United States, and are fees or taxes which plaintiff cannot avoid by withdrawing its property from use in intrastate commerce, either under the State Constitution, said Public Service Commission law of the State of Washington, under the acts of Congress regulating interstate commerce, or as a practical matter, or at all, and said fees so exacted by said laws, and each of them, constitute a burden upon interstate commerce, and upon an agency devoted thereto, and said laws, and each of them are in violation of Section 8, Article I of the Constitution of the United States, of the acts of Congress regulating interstate commerce, and

of the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States, and are null and void.

XIV

Plaintiff's authorized capital of $250,000,000 is invested in and represents the property and railway lines of the plaintiff located in the States of Minnesota, Wisconsin, Iowa, North Dakota, South Dakota, Montana, Idaho, Oregon and California, and in the Dominion of Canada, as well as in the State of Washington, and other property and securities in other companies, not included in its said system of transportation, substantially all of which property and securities in other companies are located outside the State of Washington, and have a value of over Two Hundred Million Dollars. Plaintiff's line of railroad, of which plaintiff's railroad in the State of Washington is a component part, has a value of several hundred million dollars. In the year 1931 the full true cash value of plaintiff's operating property in the State of Washington for taxation purposes, as fixed by the Tax Commission of said state as provided by statute, was the sum of $81,000,000.00 and the equalized value as determined by the State Equalization Committee in accordance with the statutes in such cases made and provided, upon which value general taxes were levied and assessed against the plaintiff's property within the State of Washington for the year 1931, was the sum of $35,384,885.00. If the statutes of the State of Washington [fol. 31] and of the United States permitted the plaintiff to withdraw from intrastate commerce in said state while still continuing its functions of a common carrier of interstate commerce therein, its very large property investment in the State of Washington, and the present or future public convenience and necessity would not permit plaintiff, as a practical matter, to discontinue its said intrastate business. If the Constitution and statutes of the State of Washington permitted the plaintiff to withdraw from intrastate commerce in said state, it could not withdraw therefrom under the statutes of the United States.

XV

Plaintiff hereby adopts and realleges Paragraph XV of its first cause of action herein, as paragraph XV of this, its third cause of action.

XVI

Plaintiff hereby adopts and realleges Paragraph XVI of its first cause of action herein, as paragraph XVI of this, its third cause of action.

XVII

The exaction from the plaintiff by the defendant of said tax of $5,528.98, or of any tax or license fee imposed by said statutes or any of them, was and is contrary to the Constitution of the United States and the Fourteenth Amendment thereto, as hereinabove alleged.

For a fourth cause of action against the defendant, plaintiff alleges:

I

Plaintiff hereby adopts and realleges Paragraphs I to VII, inclusive, of its first cause of action herein, as Paragraphs I to VII, inclusive, of this, its fourth cause of action.

VIII

During the calendar year 1932 plaintiff's gross operating revenue for its entire system of railway, and from all other sources, including both interstate and intrastate business and the transportation of mail, express, freight and passengers for the government of the United States, was the sum [fol. 32] of $55,549,246.37. During said year plaintiff's gross operating revenue from traffic moving solely within the State of Washington, including transportation of mail, freight and passengers for the government of the United States was $3,338,973.43. On March 24th, 1933, in order to avoid the imposition of the penalties and criminal prosecution, as prescribed by said statutes, as alleged in Paragraph V hereof, the plaintiff paid under protest to the Department of Public Works of the State of Washington, the annual fee, amounting for the calendar year 1932, to $3,338.97, imposed upon plaintiff by said Department under and by virtue of Chapter 107 Session Laws 1929.

IX

Plaintiff hereby adopts and realleges Paragraph IX of its first cause of action herein, as paragraph IX of this, its fourth cause of action.

X

Plaintiff hereby adopts and realleges Paragraph X of its first cause of action herein, as paragraph X of this, its fourth cause of action.

XI

At all times herein mentioned plaintiff's authorized capital stock was, and is now, the sum of $250,000,000. During the year 1932 the volume of plaintiff's intrastate business in the State of Washington was 6.011% of the volume of business done by plaintiff on its entire system. Using the formula provided in Section 5, Chapter 227 Session Laws of 1929, plaintiff's annual license fee due the Secretary of State July 1, 1933 would be computed upon 6.011% of its authorized capital stock, which would make plaintiff's authorized capital stock allocated to the State of Washington, $15,027,500.00. Applying the rates named in said statute, plaintiff's annual license fee due July 1, 1933, would amount to the sum of $1,103.88, as shown by the following [fol. 33] computation:

Capital Stock Allocated to Washington under Chapter 227, Session Laws 1929		Amount of Fees
From 0 to $50,000	$50,000	$15.00
From 50,001 to 1,000,000	950,000	237.50
From 1,000,001 to 4,000,000	3,000,000	300.00
In Excess of 4,000,000	11,027,500	551.38
Total	$15,027,500	$1103.88

Since said annual license fee, amounting to $1103.88, payable July 1, 1933 to the Secretary of State, under Chapter 227, Session Laws 1929, is less than the annual fee paid to the Department of Public Works on March 24th, 1933, under the provisions of Section 8, Chapter 227, Session Laws 1929, there will be no fee due, and none will be paid to the Secretary of State. If Chapter 107, Session Laws 1929, should be held unconstitutional and void as to the plaintiff herein, then there would be due the Department of Public Works under Chapter 107, Session Laws 1923, an annual gross operating license fee of $1500, and since the annual license fee due July 1, 1933 to the Secretary of State under Chapter 227, Session Laws 1929, would be less than said annual gross operating license fee due the Department of

Public Works on March 24th, 1933, under said Chapter 107, Session Laws 1923, under the provisions of Section 8 of said Chapter 227, Session Laws 1929 there would be no fee due the Secretary of State. If Chapter 107 Session Laws 1929 and Chapter 107, Session Laws 1923, should both be held unconstitutional and void as to the plaintiff herein, then there would be due the Secretary of State under Chapter 227, Session Laws 1929, the annual license fee payable to the Secretary of State July 1, 1933, computed as hereinabove set forth, and amounting to the sum of $1103.88, less the fee of $600 payable to the Department of Public Works under Chapter 113, Session Laws 1921, unless said Chapter 227, Session Laws 1929, should also be held unconstitutional [fol. 34] and void. In the event the last mentioned statute should also be held unconstitutional and void as to the plaintiff herein, then there would be due the Department of Public Works under Chapter 113, Session Laws 1921, an annual gross license fee of $600, unless said Chapter 113, Session Laws 1921, should also be held unconstitutional and void.

XII

Plaintiff hereby adopts and realleges paragraph XII of its first cause of action herein, as paragraph XII of this, its fourth cause of action.

XIII

Plaintiff built and equipped its line of railroad in the State of Washington more than thirty-five years ago and before said Chapter 113 Session Laws of 1921, Chapter 107 Session Laws of 1923 and Chapters 107 and 227 Session Laws of 1929, or any of them, were enacted, and has expended more than one hundred million dollars therefor. It then commenced, and ever since has carried on both interstate and intrastate commerce in said state. In 1905, long after plaintiff had constructed and equipped its line of railroad in this state there was enacted Chapter 81 Session Laws of 1905, entitled, "An Act to Establish a Railroad Commission for the State of Washington", etc., followed in 1911 by the amendment of the Public Service Commission Law, mentioned in Paragraph III hereof. By the Constitution of the State of Washington and by said statutes and acts amendatory of said statutes and supplemental

thereto, and by the Acts of Congress regulating interstate commerce, particularly Section 1 (18)-(21), Section 13, Section 15a and Section 19a thereof, there is imposed upon plaintiff an obligation to devote its property to the service of the people of said state in intrastate transportation, from which it cannot withdraw and at the same time continue to carry on its business as a common carrier in interstate commerce. Plaintiff's investment, prior to the enactment of said laws, was made to provide adequate facilities for the handling of both interstate and intrastate commerce, and a substantial part thereof was made by order of the [fol. 35] Railroad Commission of Washington, and its successors, the Public Service Commission and Department of Public Works for the purpose of equipping its property to comply with said Public Service Commission law. Plaintiff's railroad system comprises approximately 10,541 miles of track, of which approximately 1450 miles are in the State of Washington. It is taxed in the State of Washington pursuant to Chapter 130 Laws Special Session of 1925, at its fair market value, considered as a going concern, including all of its property, real, personal and mixed, and all of its rights and franchises of every kind and nature whatsoever. Said acts, including said Chapter 107 Session Laws of 1929, do not levy a property tax in lieu of all other taxation, for the reason that plaintiff's property is fully taxed on an ad valorem basis, as aforesaid. Plaintiff's gross operating revenue for business done in the State of Washington for the year 1932 was the sum of $8,389,154.43, of which $3,338,973.43 was from intrastate commerce and $5,050,181.00 from interstate commerce. Both classes of business were and are carried by plaintiff in the same trains, operated by the same employes, over the same lines of railroad, and are inextricably commingled, so that it is not and was not possible, practically and economically, or at all, to carry interstate commerce separately from intrastate commerce in different trains, or by means of different instrumentalities or employes, or on different lines. It was not and is not, as a practical matter, or at all, possible for plaintiff to withdraw from its intrastate commerce and continue its interstate commerce. The taxes imposed on plaintiff by said Chapter 113 Session Laws 1921, Chapter 107 Session Laws 1923 and Chapters 107 and 227 Session Laws of 1929, and each of them, whether viewed as taxes or

fees for the privilege of doing intrastate business in the State of Washington or otherwise, are in truth and in fact fees or taxes exacted for the privilege of doing interstate business in this state as a common carrier by railroad, and for the privilege of transporting mail, express, freight and passengers for the government of the United States, and are fees or taxes which plaintiff cannot avoid by withdrawing its property from use in intrastate commerce, either [fol. 36] under the State Constitution, said Public Service Commission Law of the State of Washington, under the acts of Congress regulating interstate commerce, or as a practical matter, or at all, and said fees so exacted by said laws, and each of them, constitute a burden upon interstate commerce, and upon an agency devoted thereto, and said laws, and each of them are in violation of Section 8, Article I of the Constitution of the United States, of the acts of Congress regulating interstate commerce, and of the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States, and are null and void.

XIV

Plaintiff's authorized capital of $250,000,000 is invested in and represents the property and railway lines of the plaintiff located in the States of Minnesota, Wisconsin, Iowa, North Dakota, South Dakota, Montana, Idaho, Oregon and California, and in the Dominion of Canada, as well as in the State of Washington, and other property and securities in other companies, not included in its said system of transportation, substantially all of which property and securities in other companies are located outside the State of Washington, and have a value of over Two Hundred Million Dollars. Plaintiff's line of railroad, of which plaintiff's railroad in the State of Washington is a component part, has a value of several hundred million dollars. In the year 1932 the full true cash value of plaintiff's operating property in the State of Washington for taxation purposes, as fixed by the Tax Commission of said state as provided by statute, was the sum of $69,574,000.00, and the equalized value as determined by the State Equalization Committee in accordance with the statutes in such cases made and provided, upon which value general taxes were levied and assessed against the plaintiff's property within the State of Washington for the year 1932, was the

sum of $30,710,723.00. If the statutes of the State of Washington and of the United States permitted the plaintiff to withdraw from intrastate commerce in said state while still continuing its functions of a common carrier of [fol. 37] interstate commerce therein, its very large property investment in the State of Washington, and the present or future public convenience and necessity would not permit plaintiff, as a practical matter, to discontinue its said intrastate business. If the Constitution and statutes of the State of Washington permitted the plaintiff to withdraw from intrastate commerce in said state, it could not withdraw therefrom under the statutes of the United States.

XV

Plaintiff hereby adopts and realleges Paragraph XV of its first cause of action herein, as Paragraph XV of this, its fourth cause of action.

XVI

Plaintiff hereby adopts and realleged Paragraph XVI of its first cause of action herein, as Paragraph XVI of this, its fourth cause of action.

XVII

The exaction from the plaintiff by the defendant of said tax of $3,338.97, or of any tax or license fee imposed by said statutes or any of them, was and is contrary to the Constitution of the United States and the Fourteenth Amendment thereto, as hereinabove alleged.

Wherefore, plaintiff prays judgment against the defendant as follows:

1. On its first cause of action for the sum of $8027.77, with interest thereon at the legal rate from March 31, 1930.

2. On its second cause of action for the sum of $7267.08, with interest thereon at the legal rate from March 26, 1931.

3. On its third cause of action for the sum of $5528.98, with interest thereon at the legal rate from March 29, 1932.

4. On its fourth cause of action for the sum of $3338.97, with interest thereon at the legal rate from March 24, 1933.

[fol. 38] 5. Together with its costs and disbursements incurred herein.

Thomas Balmer, Edwin C. Matthias, Attorneys for Plaintiff, Great Northern Railway Company. Office and Post Office Address: 305 Great Northern Railway Bldg., 404 Union Street, Seattle, Wash.

Duly sworn to by Edwin C. Matthias. Jurat omitted in printing.

[fol. 39] [File endorsement omitted]

IN SUPERIOR COURT OF THURSTON COUNTY

[Title omitted]

ANSWER TO AMENDED COMPLAINT—Filed Aug. 16, 1934

Comes now the defendant and in answer to the Amended Complaint of the plaintiff herein alleges as follows, to-wit:

That in answer to the first cause of action contained in said Amended Complaint, defendant alleges:

I

That it denies each and every allegation, matter and thing in paragraph I of said first cause of action, and each and every part and parcel thereof excepting that the plaintiff is a corporation and has filed a certified copy of its articles of organization and a certified copy of its certificates of increase of capital stock, and a certificate of its appointment of a resident agent, with the Secretary of State of the State of Washington.

II

Defendant denies each and every allegation, matter and thing contained in paragraphs XII, XIII, XIV, XV, XVI and XVII of said first cause of action and each and every part and parcel thereof excepting that the gross operating revenue for business done by plaintiff in the state of Washington for the year 1929 for interstate and intrastate business was as alleged in said paragraph XIII. And that the

[fol. 40] Department of Public Works exercises jurisdiction and supervision over many classes of public utilities including common carriers in the state of Washington, and that property belonging to plaintiff in the state of Washington is assessed upon an ad valorem basis for taxation like other property within the state.

That in answer to the second cause of action contained in said Amended Complaint, defendant alleges:

I

That as to paragraphs I to VII inclusive, and paragraphs XII, XV and XVI, incorporated in said cause of action by reference to the first cause of action in plaintiff's complaint, defendant adopts the denials of the corresponding paragraphs in its answer to plaintiff's said first cause of action.

II

That in answer to paragraphs XIII, XIV and XVII, of said second cause of action, defendant denies each and every allegation, matter and thing therein contained and each and every part and parcel thereof excepting that the gross operating revenue for business done by plaintiff in the state of Washington for the year 1930 for interstate and intrastate business was as alleged in said paragraph XIII. And that the Department of Public Works exercises jurisdiction and supervision over many classes of public utilities including common carriers in the state of Washington, and that property belonging to plaintiff in the state of Washington is assessed upon an ad valorem basis for taxation like other property within the state.

[fol. 41] That in answer to the third cause of action contained in said Amended Complaint, defendant alleges:

I

That as to paragraphs I to VII inclusive, and paragraphs XII, XV and XVI, incorporated in said cause of action by reference to the first cause of action in plaintiff's complaint, defendant adopts the denials of the corresponding paragraphs in its answer to plaintiff's said first cause of action.

II

That in answer to paragraphs XIII, XIV and XVII, of said third cause of action, defendant denies each and every allegation, matter and thing therein contained and each and every part and parcel thereof excepting that the gross operating revenue for business done by plaintiff in the state of Washington for the year 1931 for interstate and intrastate business was as alleged in said paragraph XIII. And that the Department of Public Works exercises jurisdiction and supervision over many classes of public utilities including common carriers in the state of Washington, and that property belonging to plaintiff in the state of Washington is assessed upon an ad valorem basis for taxation like other property within the state.

That in answer to the fourth cause of action contained in said Amended Complaint, defendant alleges:

I

That as to paragraphs I to VII inclusive, and paragraphs XII, XV and XVI, incorporated in said cause of action by reference to the first cause of action in plaintiff's complaint, defendant adopts the denials of the corresponding paragraphs in its answer to plaintiff's said first cause of action.

[fol. 42] II

That in answer to paragraphs XIII, XIV and XVII, of said fourth cause of action, defendant denies each and every allegation, matter and thing therein contained and each and every part and parcel thereof excepting that the gross operating revenue for business done by plaintiff in the state of Washington for the year 1932 for interstate and intrastate business was as alleged in said paragraph XIII. And that the Department of Public Works exercises jurisdiction and supervision over many classes of public utilities including common carriers in the state of Washington, and that property belonging to plaintiff in the state of Washington is assessed upon an ad valorem basis for taxation like other property within the state.

Wherefore, defendant prays that plaintiff take nothing by its action and that said action be dismissed and that the defendant recover its costs and disbursements herein.

G. W. Hamilton, Attorney General, Geo. G. Hannan, Assistant Attorney General, Attorneys for Defendant.

[fol. 43] *Duly sworn to by Geo. G. Hannan. Jurat omitted in printing.*

[fol. 44] [File endorsement omitted]

IN SUPERIOR COURT OF THURSTON COUNTY

[Title omitted]

Findings of Fact and Conclusions of Law—Filed April 1, 1935

This cause came on regularly for trial before the Honorable D. F. Wright, Judge of the above entitled court, trial by jury having been waived in the manner prescribed by the laws of the State of Washington. The plaintiff appeared by its Assistant Attorney General, Mr. George G. Hannan, and the defendant appeared by its attorney, Mr. Edwin C. Matthias. Evidence was introduced by both parties, and thereafter when both parties had rested the court took the case under advisement, and now, having duly considered all the evidence and the arguments and briefs of counsel, makes the following

FINDINGS OF FACT

I

This is an action by plaintiff to recover from the State the annual fees paid under protest to the Department of Public Works under Chapter 107, Laws of 1929 (R. C. S. 10417) for the calendar years 1929 to 1932, inclusive, over and above the fees due to the Department of Public Works under Chapter 107, Laws of 1923, which latter statute is revived if Chapter 107, Laws 1929 is held unconstitutional, and over and above the fees due to the Secretary of State

under Chapter 227, Laws 1929. The action was tried upon the amended complaint, in which recovery is prayed for the years 1929 to 1932, inclusive. The fee for the year 1933, which was also paid under protest, was included by stipulation that the amended complaint should be considered as so further amended and the demurrer, motion and answer should apply thereto. The amended complaint also attacked the fees payable to the Department of Public Works under Chapter 113, Laws 1921, as amended by Chapter 107, Laws 1923, and to the Secretary of State under [fol. 45] Chapter 227, Laws 1929, but at the trial the plaintiff did not question the validity of those statutes.

II

At all times mentioned herein and in the amended complaint the plaintiff was and now is a corporation, duly organized and existing under and by virtue of the laws of the State of Minnesota. It has filed with the Secretary of State of the State of Washington a certified copy of its charter and a certified copy of each and all of its certificates of increase of capital stock, and a certificate of its appointment of a resident agent in the State of Washington to accept service of process, and has paid all annual license fees due the State of Washington, and complied with all the laws of said state relating to foreign corporations.

II-B

At all times mentioned herein and in the amended complaint plaintiff owned and operated, and now owns and operates a transportation system of railway lines and branches, having its eastern termini at St. Paul and Duluth in the State of Minnesota, and Superior in the State of Wisconsin, and extending westerly from said termini through the States of Minnesota, North Dakota, Montana, Idaho, Washington, Oregon and California, with its western termini at Seattle and Tacoma in the State of Washington and Portland in the State of Oregon. Said line of railroad was constructed more than thirty-five years ago, and is now, and for more than thirty-five years last past has been, a public utility devoted to and used for the transportation, as a common carrier, of passengers and freight, both intrastate and interstate, and for the transportation

of mail, express, freight and passengers for the government of the United States, and has been, and is now, an instrumentality of interstate commerce and of the commerce of the government of the United States. Plaintiff is subject to Chapter 117, Laws 1911, known as the Public Service Commission Law of Washington, and acts amenda- [fol. 46] tory thereof and supplemental thereto, and to the acts of Congress regulating interstate commerce.

III

The Department of Public Works of Washington is an administrative tribunal, with three members, namely, a director and two supervisors, with the usual powers of regulation and supervision of railroads and other public utilities, and is charged with the performance of a variety of duties, other than those pertaining to railroads and utilities. It is divided into two divisions, known as the "Division of Transportation" and "Division of Public Utilities". The Division of Transportation is under a "Supervisor of Transportation" and the Division of Public Utilities is under a "Supervisor of Public Utilities". The Director of the Department has general supervision of all its activities. The Supervisor of Transportation is concerned specially with railroads, water carriers, street railways and other transportation agencies. The Supervisor of Public Utilities is concerned specially with telephone and telegraph companies, electrical companies, gas companies and other public utilities.

The jurisdiction of the Department of Public Works is summarized in its Annual Report to the Governor for the period ending December 1, 1932 to November 30, 1933, introduced in evidence in this case on page 5 thereof, as follows:

"Jurisdiction of Department

The regulatory powers of the State of Washington are exercised over telephone and telegraph companies, light and power companies, water and irrigation companies, gas companies, docks, warehouses, ferries and other water, freight and transportation companies, railroads, street railways, auto, passenger and freight transportation companies and all trucks engaged in transporting property outside

city limits for compensation, or sold or to be sold in the performance of a commercial enterprise, or for lease, rent or bail. In addition the Department has jurisdiction over railroad crossings and the inspection of railroad scales."

[fol. 47] IV

Chapter 107 Laws 1929 provides that every corporation

"engaged in business as a public utility and subject to regulation as to rates and charges by the Department of Public Works, except auto transportation and steamboat companies holding certificate under Chapter 248 Laws 1927, shall file with the Department of Public Works on or before April first annually, a statement showing its gross operating revenue for the preceding calendar year, and pay to the Department a fee of 1/10 of 1% thereof."

The Public Service Commission Law (Section 10344 R. C. S.) defines the terms used in the Act.

A Public Service Company is defined as follows:

"Every common carrier, gas company, electrical company, water company, telephone company, telegraph company, wharfinger and warehouseman, as such terms are defined in this section."

Common carriers are defined as follows:

"All railroads, railroad companies, street railroads, street railroad companies, steamboat companies, express companies, car companies, sleeping car companies, freight companies, freight line companies, and every corporation * * * operating * * * any such agency for public use in the conveyance of persons or property for hire within this state.

IV-B

Chapter 227 Laws 1929 (Section 4) provides that

"every corporation organized under the laws of this state, except the corporations for which existing law provides a different fee schedule, shall pay, on or before the first day of July of each and every year, to the Secretary of State, for the use of the state, an annual fee of $15 for the first $50,000 or less of its authorized capital stock, and 1/40 of

1% additional on all amounts in excess of $50,000, and not exceeding $1,000,000, and 1/100 of 1% additional on all amounts in excess of $1,000,000, and not exceeding $4,000,000, and 1/200 of 1% additional on all amounts in excess of $4,000,000, but in no case shall an annual license fee exceed the sum of $1250."

Section 5 of said chapter provides:

"All foreign corporations doing intrastate business, or hereafter seeking to do intrastate business in this state, shall pay for the privilege of doing such intrastate business in this state the same fees as are prescribed for domestic corporations for annual license fees in the preceding section, such fees to be computed upon the proportion of the capital stock represented or to be represented by its property and business in this state, to be ascertained by comparing the entire volume of business with the volume of intrastate business in this state."

It is also provided in Section 8 of said chapter that "the annual fee required to be paid to the Department of Public [fol. 48] Works by any public service company, shall be deducted from the annual license fee provided herein, and the excess only shall be collected."

IV-C.

At all times mentioned herein and in the amended complaint plaintiff's authorized capital stock was, and is now the sum of $250,000,000.

The following tabulation shows in the first column the year; in the second column the percentage relationship between the volume of plaintiff's intrastate business and its entire volume of business for said year; in the third column the amount of plaintiff's capital stock allocated to Washington for said year, based upon said business volume percentage as applied to its total authorized capital stock, as provided by Chapter 227 Laws 1929, and in the last column the annual license fees due for said year payable to the Secretary of State on July first of the succeeding year.

Year	Business Volume Percentage	Capital Stock Allocated to Washington	Fee Payable to Secretary of State
1929	6.375%	$15,937,500	$1,149.38
1930	6.921%	17,302,500	1,217.63
1931	7.172%	17,930,000	1,249.00
1932	6.011%	15,027,500	1,103.88
1933	5.065%	12,662,500	985.60

V

Plaintiff filed with the Department of Public Works, within the time and as required by law, the statement showing its gross operating revenue for the calendar years 1929 to 1933, inclusive, and paid to the Department of Public Works a fee of 1/10 of 1% thereof for each of said years, as required by Chapter 107 Laws 1929, amounting in the aggregate to the sum of $27,299.85.

For each of the years 1929 and 1930 there was due the Department of Public Works under Chapter 107 Laws 1923 a fee of $1500. For each of the years 1931 to 1933, inclu- [fol. 49] sive, there was due the Department of Public Works under Chapter 107 Laws 1923 a fee of $1,000.

In accordance with the provisions of Chapter 107 Laws 1923 and Chapter 227 Laws 1929, and allowing for the deduction from the annual license fee payable to the Secretary of State the amount of the annual fee payable to the Department of Public Works, the following fees were due from the plaintiff to the State of Washington for the years 1929 to 1933, inclusive:

1929	$1500.00
1930	1500.00
1931	1249.00
1932	1103.88
1933	1000.00

The following tabulation shows in the first column, year for which the fees were paid by the plaintiff; in the second column the date upon which the fees were paid; the third column the amount of fees paid under Chapter 107 Laws 1929; in the fourth column the fees due under Chapter 107 Laws 1923 and Chapter 227 Laws 1929; the fifth column the balance after deducting the fees due under Chapter 107 Laws 1923 and Chapter 227 Laws 1929 from the fees paid under Chapter 107 Laws 1929; the sixth column, interest calculated on said balance at 6% from the date of the respective payments to the first day of April, 1935, and the seventh column the total amount of fees paid under Chapter 107 Laws 1929, over and above the fees due under Chapter 107 Laws 1923 and Chapter 227 Laws 1929, including interest.

[fol. 50]

Year	Date Paid	Amt. Paid	Fees due Chap. 107 L. 1923 and Chap. 227 Laws 1929	Balance	Int. at 6% to 4/1/35 on Bal.	Total Due
1929....	3/31/30	$8,027.77	$1,500.00	$6,527.77	$1,958.33	$8,486.10
1930....	3/26/31	7,267.08	1,500.00	5,767.08	1,388.89	7,155.97
1931....	3/29/32	5,528.98	1,249.00	4,279.98	771.81	5,051.79
1932....	3/24/33	3,338.97	1,103.88	2,235.09	270.81	2,505.90
1933....	3/27/34	3,137.05	1,000.00	2,137.05	129.66	2,266.71
		27,299.85	6,352.88	20,946.97	4,519.50	25,466.47

VI

Said payments and each of them were made to the Department of Public Works by plaintiff under protest, plaintiff alleging and protesting that said Chapter 107, Laws 1929, as applied to it, was void under the commerce clause of the Fourteenth Amendment to the Constitution of the United States, in that said chapter imposes a tax on plaintiff's property devoted to commerce among the states and with foreign nations, and a tax upon and a regulation of such commerce in violation of Section 8, Article I of the Constitution of the United States, and operates to tax the property of said Railway Company in other states having no taxable situs in Washington, and thus deprives it of its property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States, and that said tax or fee is discriminatory and unequal as between said plaintiff and others similarly situated, and thus denies said plaintiff the equal protection of the laws, in violation of said Fourteenth Amendment to the Constitution of the United States, and that the tax imposed by said statute is in violation of the Constitution of the United States, in that it is imposed at least in part for the purpose of regulating and inspecting other public utilities, in no way related to or connected with the business of operating a common carrier railway, and for the purpose [fol. 51] of defraying the expenses of performing functions and furnishing services entirely disconnected with the regulation of railroads, and for the purpose of regulating and supervising interstate services, facilities and rates of railroads engaged in interstate commerce; that the tax is imposed and used in part for the purpose of defraying the expenses of the Department of Public Works in proceed-

ings before the Interstate Commerce Commission in connection with interstate rates, services and facilities, and that no such tax is imposed upon persons directly benefited by such proceedings, and that the fees collected have exceeded the cost of regulation and inspection of the railroads by such a large sum that the tax imposed by said statute is unreasonable and disproportionate to the services rendered, and that Chapter 107, Laws 1929 in effect levies a tax upon revenue derived from the transportation of mail, passengers, freight and express for the government of the United States, and thereby imposes a burden upon, and interferes with, the exercise of governmental powers of the Federal Government, which the Constitution of the United States contemplates shall be supreme and independent of state supervision or regulation, and for said reasons the tax or fee imposed by said Chapter 107, Laws 1929, is unlawful, null and void as to the plaintiff.

VII

In addition to the fees paid under said Chapter 107, Laws of 1929, by railroads and public utilities known as "filing fees" or "report fees", the Department of Public Works receives other fees. The following is a copy of a "financial statement" on page 79 of the annual report of [fol. 52] the Department to the Governor for 1933. It is typical of the other years.

"Receipts

	Dec. 1, 1932 to Mar. 31, 1933	Apr. 1, 1933 to Nov. 30, 1933	Total Fiscal Year Ending Nov. 30, 1933
Auto Transportation, gross revenue fees	$11,979.37	$35,201.53	$47,180.90
Auto Transportation, application fees	110.00	1,566.00	1,676.00
Report filing fees	31,395.27	28,397.54	59,792.81
Motor Vehicle Permit, gross revenue fees	.....	8,649.69	8,649.69
Motor Vehicle Permit, application fees	.....	14,750.00	14,750.00
Motor Vehicle Permit, plate fees	.....	6,133.00	6,133.00
Storage Warehouse, gross revenu fees	.....	5.00	5.00
Storage Warehouse, application fe s.	.....	1,130.00	1,130.00
Scale Test fees	200.00	1,800.00	2,000.00
Utility Overcharge fees	91.13	99.95	191.08
Miscellaneous Fees	701.96	1,739.92	2,441.88
Certified Boat fees	3,536.94	853.86	4,390.80
Special Case Cost fees	.....	3,055.08	3,055.08
Totals	$48,014.67	$103,381.57	$151,396.24"

VIII

Upon taking effect of Chapter 107, Laws 1929, and payment of fees thereby imposed and fees imposed upon other businesses subject to the jurisdiction of the Department, the legislature made no appropriation for the expenses of the Department's activities from the general fund. The expenses of all of the Department's activities were payable only from such fees, except that the legislature, at its session of 1933, appropriated $250,000 for the use of the Department in conducting certain special investigations and valuations of public utility companies other than railroad or transportation companies, as will appear on page 200 of the annual report of the Department to the Governor for the year ending November 30, 1934.

The receipts of the Department of Public Works paid by railroad and public utility corporations and receipts of the [fol. 53] Department from other sources provided by law, as hereinbefore stated, were and have been commingled in one common fund. The report and filing fees paid by railroads and other utilities were and have been at all times commingled together into a common fund and expenses incurred by the Department in supervising and regulating railroads and other common carriers, gas companies, electrical companies, water companies, telephone companies, telegraph companies, wharfingers and warehousemen, have been paid out of said common fund.

IX

Said Chapter 107, Laws of 1929, does not provide that the fee paid by railroads shall be devoted to the expense of supervising and regulating railroads nor limited by such expense; but said fee of 1/10 of 1%, paid by railroads and other public utility companies above described, is a fee required to be paid by said Chapter 107, Laws of 1929, to defray the expenses of the Department of Public Works in supervising and regulating railroads and said other public utility companies. The Department of Public Works, in 1929 to 1934, inclusive, incurred large expenses in the discharge of its duties relating to public utility companies other than railroads and incurred a relatively small expense in the discharge of its duties relating to the regulation and supervision of railroads. The Department is not

required by the act to keep an account, and has kept no account, of the cost of performing its supervisory and regulatory duties relating to railroads separate and apart from the cost of performing its supervisory and regulatory duties relating to said other public utility companies. It is not and has not been, possible to separate and compute the cost of performance by the Department of Public Works of its supervisory and regulatory duties relating to railroads from the cost and expense of its supervisory and [fol. 54] regulatory duties relating to telephone and telegraph, electrical, water, gas and other public utility corporations. Nor is the Department required by law to keep, nor has it in fact ever kept any account of the expenses incurred by the Division of Transportation in the discharge of its duties separately from the expenses incurred by the Division of Public Utilities in the performance of its duties, and it is not and was not possible to compute the expenses incurred by said Division of Transportation separately and apart from the expenses incurred by said Division of Public Utilities.

X

In addition to its supervisory and regulatory duties relating to railroads said Department is required by law to perform various other duties and functions relating to railroads of a non-supervisory and non-regulatory nature; in particular, the Department has the duty of prosecuting or defending various rate cases before the Interstate Commerce Commission relating to rates of interstate railroads and to rates of railroads operating in other states and not subject to its jurisdiction. It pays all of its expenses incurred in the discharge of those functions and duties out of said filing or report fees paid by railroad companies and public utilities. Shippers and the public generally who are parties to or are or may be benefited by said proceedings before the Interstate Commerce Commission pay no portion of the expenses of said proceedings and no fee or tax is imposed upon them for that purpose, although all such parties, including plaintiff, are taxed on their property upon an ad valorem basis to defray governmental expenses. The following is quoted from page 1 of the Department's report to the Governor for the year 1930 and is illustrative of its functions in this particular, to-wit:

"An important part of the duties of the Department of Public Works is that of seeking relief before the Interstate Commerce Commission in matters of interstate rates where they adversely affect citizens of Washington. It also participates in other rate cases when the matter involves con- [fol. 55] ditions or activities in this state. The Department during the past year participated in many proceedings before the Interstate Commerce Commission. The following include the more important matters with which it was engaged:"

The report follows with the particulars of the activities of the Department in connection with matters pending before the Interstate Commerce Commission wherein it appeared and took part as a litigant and in an advisory capacity to the Interstate Commerce Commission, in some instances lining up on the same side as the railroads operating in this state, including plaintiff, in other instances taking the opposite side, and in still others taking sides as between railroads operating in this state. In one case in particular before the Interstate Commerce Commission in which the Department of Public Works appeared on behalf of the State of Washington in a contested case which resulted in a lengthy hearing and later in proceedings in the courts was involved the question whether the Interstate Commerce Commission could order the construction of a cross-state railroad line in the states of Oregon and Idaho. (See pp. 4 and 6 of 1929 and 1930 Annual Reports of Department, introduced in evidence as Exhibits 9 and 8, respectively, under title on said pages "Railroad Extension between Homestead, Oregon and Lewiston, Idaho.") The Department incurred a large expense in said non-regulatory and non-supervisory activities, but no account is required to be kept or was kept of the amount thereof and it is impossible to determine the same, and no attempt was made to do so on the trial of this case.

X-B

The Department of Public Works has also undertaken to act in a judicial capacity in overcharge and reparation cases filed in that department by shippers against railroads, including plaintiff, and has held hearings, taken testimony and made and entered awards in many of such cases in favor of the shippers and against the railroads, including

[fol. 56] plaintiff. Said Department pays and has paid all of its expenses incurred in such reparation cases out of said Filing or Report Fees paid by the railroad companies and public utilities. In the year 1929, 14 of the formal proceedings before said Department were against railroads to recover on overcharge or reparation claims. In the year 1930 there were 22 such cases before the Department; in the year 1932 twenty; and in the year 1933, thirty. (See pp. 3-16 of 1929 Annual Report, Exhibit 9; pp. 5-18 of 1930 Annual Report, Exhibit 8; pp. 22-36 of 1932 Annual Report, Exhibit 6 and pp. 13-42 of 1933 Annual Report, Exhibit 5.) The number of such cases for the year 1931 was substantially the same. Plaintiff's railroad is taxed in the State of Washington, and was so taxed during the years 1929 to 1933, inclusive, under and by virtue of Chapter 130, Washington Special Session Laws 1925, on its fair market value considered as a going concern, including all of its property, real, personal and mixed, and all of its rights and franchises of every kind and nature whatsoever. During said years 1929 to 1933, inclusive, in addition to said ad valorem taxes, the plaintiff also paid said fees to the Department of Public Works under Chapter 107, Laws of 1923, while no such fees to the Department of Public Works were paid or are required to be paid by statute by said shippers who were parties to said overcharge and reparation proceedings. The Department incurred a large expense in said overcharge and reparation cases, but no account is required to be kept or was kept of the amount thereof, and it is not only impossible to determine the cost of such cases to the Department, but no attempt was made to do so in the trial of this case.

XI

The accumulation of the amounts paid by railroads and other public utility corporations and other receipts of the Department over the period 1929 to 1933, inclusive, are shown in the annual reports of the Department to the Governor in a financial statement appended thereto. At the end of 1933, as shown on page 79 of the report for 1933, there was a surplus in the Department's fund amount-[fol. 57] ing to $224,193.95. The receipts of the Department from all sources were in excess of the expenditures of the Department in the performance of its manifold duties and

activities during said period by said amount. But no separate accounts were kept or required to be kept, with the various public utility companies concerned, and it is impossible to determine what was the expense of regulating and supervising railroads separately from the expense of regulating and supervising other public utility corporations with which the funds contributed by railroads were commingled; and it is impossible to determine what was the expense incurred by the Department in discharging its functions and duties not relating to supervising and inspecting railroad companies and other public utilities all of which were required by law to be paid and were in fact paid out of said common fund. But the court finds that the activities of the Department connected with the regulation and supervision of railroads are and were at all times relatively unimportant and inexpensive in comparison with the time devoted to and the cost incurred by the Department in regulating and supervising auto transportation companies and motor vehicle operations, and its activities relating to and expenses incurred in the regulation and supervision of telephone, electrical, gas, water and public utility corporations other than railroads and in its non-regulatory activities relating to railroads. The activities of the Department relating to the discharge of its manifold functions and duties are stated in detail in its several annual reports to the Governor offered in evidence in this cause. Said balance of $224,193.95 and said additional sums appropriated by the legislature in 1933 were expended by the Department in 1934 in carrying on investigations of and litigation with public utility corporations other than railroads and with which railroads, including plaintiff, were [fol. 58] in no way concerned, as more fully appears from the Department's report to the Governor for 1934. See especially pages 11 and 91 et seq. thereof.

XII

From a consideration of Chapter 107, Laws of 1929, and the annual reports of the Department, and other facts of record herein, the court finds that said act does not and was not intended to impose a fee on railroads commensurate with and to pay the cost of their proper supervision and regulation by the Department of Public Works. Said

Chapter 107, Laws of 1929, and the fee imposed thereby on railroad companies, including plaintiff, is in fact a revenue measure intended to impose, and which does impose, upon railroads and other utility corporations the cost and expense of regulating and supervising railroads and other utility corporations and to defray the cost and expense of all of the activities of the Department whether or not of a regulatory and supervisory nature and the excess collected over expenditures reverts to and is a part of the general funds of the state.

XIII

The complaint attacks Chapter 107, Laws of 1929, in two respects, viz: first, as an occupation or license fee for the privilege of doing business; and second, as a regulatory fee to defray expenses of the Department of Public Works. Since the complaint was filed the Supreme Court has held, in Pacific T. & T. Co. v. Seattle, 172 Wash. 649, that the fee is for the latter purpose. This was recognized at the argument and so much of the complaint as attacks the act as imposing an occupation or privilege tax has become irrelevant and will be disregarded.

Done in open court this 1 day of April, 1935.

D. F. Wright, Judge.

[fol. 59] Pursuant to the foregoing Findings of Fact, the Court makes the following:

Conclusions of Law

I

The state may impose on a railroad or other corporation or business the cost of its supervision. The principle is that where a business is of such nature that it needs regulation the cost may be imposed on the one conducting it. In such case regulation and supervision is in the interest and for the benefit as well of the corporation regulated as of the public. Charlotte etc. R. Co. v. Gibbs, 142 U. S. 386; New York vs. Squier, 145 U. S. 75; Postal T. Co. vs. New Hope, 192 U. S. 55; Atlantic & Pacific Tel. Co. vs. Philadelphia, 190 U. S. 160. But this just principle is circumscribed and limited by the reasons for it. Therefore, a regulatory fee must be devoted to and limited by the cost of reasonable and necessary supervision and regulation within a margin

of reasonableness known from experience. If the fees exceed these limitations it is not what it purports to be; nor can a court uphold so much of the fee as is reasonable, for to do that is to occupy the legislative field. Atlantic & Pacific T. Co. vs. Philadelphia, supra. Having regard for the purpose of the fee and the limitation upon the amount, it follows, as of course, that railroad companies may not be charged with the expense of regulating electrical companies, telephone and telegraph companies, water companies and other unrelated businesses, requiring supervision and regulation, any more than a tax may be imposed on oil to pay the cost of inspection of grain, or a tax upon grain to pay for the inspection of wool and hides, etc. Each kind of business and each article may be charged only with the expense of its own regulation or inspection. This principle is clearly implied in the cases cited. It follows from the nature of the tax. See also State vs. Standard Oil Co., 161 N. W. 537. The opinions in Davis-Smith vs. Clausen, 65 Wash. 156, and Mountain Tbr. Co. vs. Wash., [fol. 60] 243 U. S. 219, sustaining the state industrial insurance act, involve the same principle and are in point. Other cases in that category are Noble State Bank vs. Haskell, 219 U. S. 104, sustaining a bank guaranty law; Hendrick vs. Maryland, 235 U. S. 610, sustaining license fees for auto vehicles as compensation for the use of improved roadways for a class of users for whose needs they were constructed. Statutes of that kind are familiar examples of legislation of antiquity, of which, perhaps, the earliest example is a tax upon the owners of dogs to pay for sheep they may kill. The principle common to all of these laws is propriety of imposing a special burden on a class responsible for the need thereof. Never has the principle been applied, nor can it ever be applied consistently with constitutional guarantees, to impose a tax upon some to discharge an obligation for which others are responsible. It is obvious that Chapter 107, Laws of 1929, is not animated by this just principle. It imposes on railroads and a variety of public utility companies a flat fee of 1/10 of 1 percent of the gross income of all of them to pay the expenses incurred by the Department in regulating and supervising all of them. The fee paid by railroads is not devoted by the act to the expense of supervising and regulating railroads. When collected it is a part of the general fund subject to appropriation for any

purpose chosen by the legislature. There is no provision in the act for ascertaining the cost incurred by the Department in supervising railroads separately from the cost it incurs in supervising and regulating public utility corporations whose business and activities have no relation to railroads. It is true that a state may, for reasons of convenience or economy, impose upon a single tribunal a variety of functions. But, if it does so, it must also provide that the tax imposed upon each business be devoted to super- [fol. 61] vision and regulation of that business and be not unreasonably in excess thereof. State vs. Standard Oil Co., supra. In all such cases the burden is on him who seeks to uphold such a tax to show the facts necessary to its validity. Foote vs. Stanley, 232 U. S. 494.

II

Chapter 107, Laws of 1929, offends in another particular. The functions and duties of the Department relating to railroads include many which are not regulatory or supervisory in their character, particularly its duties in connection with proceedings before the Interstate Commerce Commission involving interstate rates, and which, in many if not all instances, involve railroads not operating in the state, nor subject to the Department's jurisdiction, are not supervisory or regulatory in their nature. The expense of such activities may not be charged to railroads operating in this state, including plaintiff, under the pretext of a fee to pay the expenses of supervising and regulating their own business. In taking part in litigation before the Interstate Commerce Commission the Department acts much as any other litigant who seeks to assist the court or tribunal in reaching a correct conclusion. The functions and duties of the Department with respect to overcharge and reparation cases are judicial rather than supervisory and regulatory in character and the expense of such proceedings may not be charged exclusively to the railroads, including plaintiff, and other public utilities under the pretext of a fee to pay the expenses of supervising and regulating the business of such railroads when both the railroads, including plaintiff, and the other parties to such cases, are taxed upon their property upon an ad valorem basis for the purpose of defraying the cost of performing judicial and other functions of the state government. However beneficial all of such activi-

[fol. 62] ties, functions and duties of the Department may be, they are not of a regulatory or supervisory nature and the expense must be met by general taxation. There are many other instances of non-supervisory and non-regulatory activities and functions of the Department shown by their annual reports, but those instanced above are sufficient to make the point. The Department, as is also shown by its annual reports, incurs large expense in such non-supervisory and non-regulatory activities. All these expenses are payable out of the fee charged by Chapter 107, Laws of 1929. The act makes no provision for keeping this class of expenses separate from expenses incurred in regulatory and supervisory activities. The Department has kept no account of such expense and it is impossible to ascertain it, even if the omission of the law itself to protect the corporations' constitutional rights could be cured by the voluntary action of the Department. Compare L. & N. R. vs. Central Stockyards, 212 U. S. 132. The defendant has utterly failed to sustain the burden which was upon it to prove that the fees paid by plaintiff were no more than reasonably sufficient to meet the legitimate expenses of supervising and regulating the railroads, including plaintiff. When an alleged regulatory statute directs that regulatory fees shall be devoted to defraying other expenses as well as regulatory expenses, the presumption is that the fees fixed are unreasonable and the burden of establishing the contrary is on the one asserting the validity of the statute. Hugo vs. Suazo, 59 Fed. (2d) 386.

III

The court is of opinion and concludes that Chapter 107, Laws of 1929, offends against Section 8, Article I, and the equal protection and due process clauses of the 14th Amendment to the Constitution of the United States and Article I, [fol. 63] Sections 3 and 12 and Article VII, Sections 1, 2 and 3 of the State Constitution, as amended, and is void.

IV

Let judgment be entered that plaintiff recover the amount paid to the Department of Public Works under Chapter 107, Laws 1929 over and above the fees due the state under Chapter 107, Laws 1923 and Chapter 227, Laws 1929, together with interest at the legal rate from the respective

dates of payment, making a total judgment in the sum of Twenty-five Thousand, Four Hundred Sixty-six 47/100 ($25,466.47) Dollars, all as shown in Finding of Fact No. V, together with costs to be taxed.

Dated the 1st day of April, 1935.

D. F. Wright, Judge.

[fol. 64] [File endorsement omitted]

IN SUPERIOR COURT OF THURSTON COUNTY

GREAT NORTHERN RAILWAY COMPANY, a Corporation
Plaintiff,

vs.

STATE OF WASHINGTON, Defendant

JUDGMENT—Filed April 1, 1935

This cause came on regularly for hearing on this 1st day of April, 1935 on motion of the plaintiff for the entry of judgment, the plaintiff appearing by its attorneys, Thomas Balmer and Edwin C. Matthias and the defendant appearing by G. W. Hamilton, Attorney General and George G. Hannan, Assistant Attorney General, and the court having heretofore made and entered its findings of fact and conclusions of law, and the court being fully advised in the premises,

It is Ordered, Adjudged and Decreed that the plaintiff have and recover from the defendant the sum of Twenty-five Thousand Four Hundred Sixty-six and 47/100 ($25,466.47) Dollars, together with its costs herein taxed in the sum of $21.00 consisting of clerk's fees amounting to $11.00 and statutory attorney's fees $10.00, making a total judgment in favor of plaintiff and against the defendant in the sum of Twenty-five Thousand, Four Hundred Eighty-seven 47/100 ($25,487.47) Dollars.

Done in open court this 1st day of April, 1935.

D. F. Wright, Judge.

[fols. 65-67] [File endorsements omitted]

IN SUPERIOR COURT OF THURSTON COUNTY

[Titles omitted]

Statement of Facts—Filed May 17, 1935

Before the Honorable D. F. Wright, Judge Presiding

[fol. 68] Be it remembered, that the above entitled causes came on regularly for hearing before the Honorable D. F. Wright, one of the judges of the above entitled court, sitting in Department No. 2 of the Superior Court of the State of Washington for Thurston County, at the Thurston County Court House at Olympia, Washington, at the hour of ten o'clock a. m. on Thursday, the 3d day of January, A. D. 1935; the parties herein appearing by their respective attorneys as follows:

The plaintiff, Great Northern Railway Company, by Edwin C. Matthias;

The plaintiff, Northern Pacific Railway Company, by L. B. daPonte;

The plaintiff, Chicago, Milwaukee, St. Paul and Pacific Railroad Company, by O. G. Edwards;

The plaintiff, Oregon-Washington Railroad & Navigation Company, by F. T. Merritt;

The defendant by Geo. G. Hannan, Assistant Attorney General;

Whereupon, the following proceedings were had and testimony taken, to-wit:

COLLOQUY AND OFFERS IN EVIDENCE

Mr. daPonte: If Your Honor please, these four cases, agreed to be tried on the same record, are all alike except the judgments to be entered.

The Court: Of course, the amounts, etc.

Mr. daPonte: Yes. Now I think we are all agreed we will ask that the complaint be amended so the only question is the 1929 Act.

[fol. 69] Mr. Matthias: That is Chapter 107, 1929.

Mr. daPonte: Before that fee would be due under the prior act, I think the Northern Pacific, and I think the Great

Northern, at least the Northern Pacific, would be $1500.00.

Mr. Hannan: I am not stipulating as to that amount.

Mr. daPonte: No, I am sure that is correct, $1500.00, the amount of our fee under the Chapter 107, Laws of 1929. That will simplify the case very considerably.

Mr. Hannan: Then your position is practically to withdraw the allegation of the effect excepting as to the Laws of 1929.

Mr. daPonte: Yes, and only ask for recovery of the fee under that act less the amount that would have been paid under the prior act. Also, so the complaint to the tax, 1929, will be clear, that is an inspection or supervision tax. Since the complaint was filed, the Supreme Court fixed the status of the statute as one levying a supervision or inspection fee. The complaint attacks the Act of 1929 on the theory it might be regarded as a statute levying an occupation or privilege tax, and also as an inspection or supervision fee. Since the complaint was filed, the Supreme Court held the Act of 1929, has held it was an inspection tax.

The Court: That was in the Seattle case, a telephone case. [fol. 70] Mr. daPonte: So the proceedings now should be simple and short.

Mr. Hannan: What do you want with regard to the year 1933?

Mr. daPonte: We made a stipulation in our case that the complaint be read as amended to attack the fee paid about April 1, 1934, and that the pleading, and that your answer shall stand.

Mr. Hannan: We have to dispose of demurrers before the answer is considered. I suppose the demurrer is the same.

Mr. Matthias: I thought it was disposed of.

The Court: I thought so, too.

Mr. Hannan: You misunderstood me. The Court overruled the demurrers to the amended complaints and answers. And now we are bringing in a supplemental answer by stipulation, and they are amended for the succeeding year after the start, which is due April 1, 1934. Now then, we are willing to stipulate that whether amended or not, the complaint will be considered amended and supplemented to cover that year, and the court can rule on the demurrers on that. It would be expected to be the same as others.

Mr. daPonte: This stipulation of ours covers it all about as you said. There is a stipulation that covers our situation.

Mr. Hannan If the Court has no reason, then, to change the ruling on the matter of ruling on the demurrer, then [fol. 71] take up the answer.

Mr. Matthias: If Your Honor please, with respect to the Great Northern case, there is no written stipulation on file with respect to the 1933 fee which was paid March 27, 19— March 29, 1934. That fee was $3,137.05.

As I understand it, the State is willing to stipulate that that fee was paid under protest and that it may be treated as if it was included in these complaints as a separate cause of action with the understanding that if we recover we will be entitled to recover also that fee. If the judgment is in favor of the State, the judgment will be a bar to any further proceedings for the recovery of that fee.

Mr. Hannan: The same situation as the prior years under the other cause of action.

Mr. Matthias: I have a copy of that receipt, the original. If it is satisfactory with you, we will stipulate the amount, $3,137.05. And Mr. Hannan would like to have me introduce the copy of the receipt for payment under protest, so—you have no objection to its being a copy, have you?

Mr. Hannan: No, I have another copy here.

Mr. Matthias: With that understanding, then, I will offer this copy of the receipt, which is a receipt for the payment under protest, dated March 29, 1934, for the 1933 fee.

[fol. 72] (Receipt for payment under protest admitted in evidence and marked Plaintiff Great Northern Railway Company's Exhibit No. 1.)

Mr. Matthias: The record might show that the receipt consists of two pages.

A little out of order, I would like to supplement Mr. daPonte's statement a little. As I understand it, our complaints really attack two laws in 1929, Chapter 107 and Chapter 227, but Chapter 227 did not become material unless these other statutes which we also attack were set aside, which were Chapter 107, Laws of 1923, and Chapter 113, Laws of 1921. Mr. daPonte stated at the opening that we are only attacking Chapter 107 of the Laws of 1929. As I understand the law, since that statute is amendatory of Chapter 107 of the Laws of 1923, should the decision be in our favor, the 1923 statute will be revived, and whatever the fees are under that statute would be the fees we would

have to pay, and therefore we would only be entitled to recover what we sued for less that fee.

In the telephone case, the Supreme Court held that this was a regulatory statute composed of a fee for regulatory purposes to enforce a Public Service Commission law, but [fol. 73] our contention is that as the statute operates it is collecting a larger fee than is required to meet those expenses, and therefore, while declared to be regulatory, it is in fact a revenue measure because it raises more revenues than required for regulation purposes.

Mr. Hannan: If the Court please, before going to introducing testimony, I want at this time to object to the introduction of any testimony on the amended complaint for the reason that they have no capacity to sue. They are suing to recover the fee, the payment of which is required, authorizing them, if at all, to bring the suit, and therefore it is not really a payment, and it all appears under protest. Second, for the reason the complaint does not state facts sufficient to constitute a cause of action. That was argued before Your Honor on demurrer. I may add there, I think it was covered, too, at the argument of the demurrer, there is no order from the Secretary of State with regard to his fixing the amount of the fee, if that applies. I object to any testimony going in under the amended complaint, as I stated at the time of the argument of demurrer, for those reasons.

Mr. Edwards: The amended complaint of the Milwaukee Railroad applies only to and including the year 1932. We [fol. 74] are in the same position of the Great Northern for 1933. I have here the original receipt.

Mr. Hannan: Have you filed a supplemental complaint?

Mr. Edwards: No.

Mr. Hannan: The same stipulation is satisfactory to me, the year 1933 abides by the decision of the Court in the other years so far as your case is concerned, and if against the State, you will recover, and if in favor of the State, you don't recover, for that year as well as the others.

Mr. Edwards: That is satisfactory, and I would like to introduce in evidence a copy of the receipt for that year's fees. I have the original.

Mr. Hannan: I think I have them here, too. I don't remember whether we admitted the amount of those or not.

Mr. Edwards: I would like to introduce this as Milwaukee Exhibit—I think probably it had better be given No. 2.

The Court: Yes.

(Receipt of Chicago, Milwaukee, St. Paul and Pacific Railroad Company admitted in evidence and marked Plaintiff Milwaukee Exhibit No. 2.)

Mr. daPonte: We are ready to go ahead.

Mr. Merritt: If you are through, I want to state, if the Court please, with regard to the Oregon-Washington, I offered a supplemental complaint covering the payment for [fol. 75] the year 1933. Counsel, in his answer, omitted to cover, to answer to that complaint, but it may be understood that the denials of his answer to the causes of action in the amended complaint apply to the supplemental complaint as though it was on that.

Mr. Hannan: I believe there is a stipulation on file in that, that the motion on demurrers applies.

Mr. Merritt: I don't think it applies.

Mr. Hannan: It is the same as his receipt.

Mr. Merritt: You admit our payment, the amount of our payment, and tax paid under protest, so I take it is not necessary to enter the receipt.

Mr. Hannan: What is the amount?

Mr. Merritt: '33 is $712.87.

Mr. Hannan: Have you a copy of the receipt of that?

Mr. Merritt: Yes, I think so.

Mr. daPonte: Your Honor, the Northern Pacific offers in evidence—— (Interrupted.)

Mr. Hannan: Just a minute.

Mr. Merritt: The Oregon-Washington offer in evidence the receipt from the Department of Public Works for the payment made by the Oregon-Washington Railroad & Navigation Company for the year 1933.

The Court: That will be three.

(Receipt of payment of Oregon-Washington Railroad & Navigation Company admitted in evidence and marked Plaintiff Oregon-Washington Exhibit No. 3.)

[fol. 76] Mr. Hannan: The amount is how much?

Mr. Merritt: $712.87.

Mr. daPonte: We will, the Northern Pacific offers a Stipulation on file, dated the 10th day of April, 1934, regarding

payment of the tax for the year 1933, and the tender of protest attached to the stipulation. That is a part of the court file.

(Stipulation, with attached protest, admitted in evidence and marked Plaintiff Northern Pacific Railway Company's Exhibit No. 4.)

Mr. daPonte: Now, Mr. Hannan, I have a similar protest and stipulation for each of the prior years. If there is any question about that, is it necessary to offer those documents?

Mr. Hannan: I don't remember if I denied that in the protest or not.

Mr. Matthias: You admit that in your answer.

Mr. Hannan: What is the matter with you? I was just asking you about it.

Mr. daPonte: There are the protests.

Mr. Hannan: Either put them in or let it go on stipulation.

Mr. daPonte: I would rather not put them in. It may be admitted they were paid as alleged?

Mr. Hannan: Yes, there is no doubt about that.

Mr. Matthias: That goes for all the cases?

Mr. Hannan: Yes.

Mr. daPonte: For all of the defendants, I offer in evi- [fol. 77] dence a copy of the report of the Departmnet of Public Works to the Governor for the year 1933. Let that be marked.

The Court: That will be for all?

Mr. daPonte: Yes.

Mr. Hannan: Are you going to mark that as an exhibit?

(Thirteenth Annual Report of the Department of Public Works of Washington to the Governor admitted in evidence and marked Plaintiffs' Exhibit No. 5.)

Mr. Hannan: Report, 1933?

The Court: Yes.

Mr. Hannan: I object to it as incompetent, irrelevant, and immaterial.

Mr. Matthias: Is that for 1933?

Mr. daPonte: Yes. Plaintiffs offer in evidence the same for the year 1932. That would be exhibit 6, Plaintiffs' Exhibit No. 6.

Mr. Hannan: Same objection.
The Court: It may be admitted.

(Twelfth Annual Report of the Department of Public Works of Washington to the Governor admitted in evidence and marked Plaintiffs' Exhibit No. 6.)

Mr. daPonte: The report to the Governor, the Department's report to the Governor for the year 1931.
The Court: '31.
Mr. Hannan: That is Exhibit 7, is it?
The Court: Seven.

[fol. 78] (Eleventh Annual Report of the Department of Public Works of Washington to the Governor admitted in evidence and marked Plaintiffs' Exhibit No. 7.)

Mr. daPonte: And the Annual Report of the Department to the Governor for the year 1930. This is Exhibit 8.

(Tenth Annual Report of the Department of Public Works of Washington to the Governor admitted in evidence and marked Plaintiffs' Exhibit No. 8.)

Mr. daPonte: And the Department's report to the Governor for the year 1929. That will be Plaintiffs' Exhibit 9.
The Court: Nine.

(Ninth Annual Report of the Department of Public Works of Washington to the Governor admitted in evidence and marked Plaintiffs' Exhibit No. 9.)

Mr. daPonte: I didn't give you that one, did I?
Mr. Hannan: Same objection to all of those.

Mr. daPonte: Your Honor please, the Department's report of the current year, 1935, is about to go to the printer, and I want the offer left open to offer a printed copy when it is printed.

Mr. Hannan: I don't think that is material at all. I make the same objection for the further reason it is subsequent to these things. It doesn't apply. I don't know if the [fol. 79] Court wants to hold the case open anyway.

Mr. daPonte: It probably wouldn't be decided before then anyway. It will be out in a week or two.

The Court: It may go in the record anyway.
Mr. Matthias: That will be 10.

(Said Annual Report of the Department of Public Works of Washington to the Governor to be offered in evidence at at later date as Plaintiffs' Exhibit No. 10.)

Mr. daPonte: I want to read into the record from—I want to read this, Mr. Hannan.

Mr. Hannan: That is the inaugural message? That is immaterial.

Mr. daPonte: I want to read from Page 15 of the Second Inaugural Message of Roland H. Hartley in, January 16, 1929.

Mr. Hannan: I object to that being admitted in evidence. It is incompetent, irrelevant, and immaterial, and furthermore, if anything is put in, it should be the whole report and not a part of it, but the whole report is incompetent, irrelevant, and immaterial.

Mr. daPonte: This is the only portion that bears upon the matter we have here.

Mr. Hannan: It is absolutely immaterial. The statement of the executive hasn't anything to do with it, and I object.

Mr. daPonte: I am not talking about it. You suggested that the whole report go in. If you want it all in——(Interrupted.)

[fol. 80] Mr. Hannan: I don't want any of it in.

Mr. daPonte: I understand your objection. You say the whole document should go in. It would have no bearing on my own theory.

Mr. Hannan: I am not concerned with your theory of it.

Mr. daPonte: I will read this portion into the record. There is no other portion of the document that has any bearing whatever, even under my theory. I see no reason to put this complete document in the record to encumber it.

Mr. Hannan: I object to it going in, and if at all, the whole thing.

The Court: I think you may put it in. I am inclined to agree with Mr. Hannan.

(Second Inaugural Message of Governor Roland H. Hartley to the State Legislature, Twenty-First Session, January 16, 1929, admitted in evidence and marked Plaintiffs' Exhibit No. 11.)

Mr. daPonte: I will read this portion and file the document.

Mr. Hannan: What exhibit is that?
Mr. daPonte: Eleven.

"The cost of operation of the Department of Public Works is now paid from three sources—the general fund, the auto transportation fund, and the public service revolving fund. The motor vehicle division is entirely self-sup-
[fol. 81] porting, all expenses being paid from the auto transportation fund, derived from an assessment of one per cent of the gross earnings of all motor stage and freight lines. The public utilities and transportation divisions should likewise be self-supporting, and as to operating costs, the work of this department carried on as a unit.

"It is recommended that the fees now required of public utilities and transportation companies, other than motor, be sufficiently increased so that the department may carry on all of its activities without cost to the general taxpayer. It is further recommended that the auto transportation and public service revolving funds be abolished, and all receipts paid into the general fund. There is no more justification for setting up special funds in this department than for an insurance fund in the office of the Insurance Commissioner, a banking or savings and loan fund in the Department of Efficiency, or a lawyers', doctors', or barbers' fund in the Department of Licenses."

That is all of his message that deals with the subject here. I ask that be filed as an exhibit if necessary. Page 15 is all we are concerned with, or anybody else.

Mr. Hannan: I object to any part of it going in except as a whole, and as I said before, it is all incompetent, ir-
[fol. 82] relevant, and immaterial.

Mr. daPonte: That is all right. It is all good literature.

The Court: It may be admitted for the purpose of the record. I am inclined to agree with Mr. Hannan it has no relevancy.

Mr. daPonte: In and of itself it has none, of course, but the legislature, as shown, did follow Governor Hartley's mesage in passing this Act of 1929, so if that, it is explanatory statement.

Now, then, there is only one other matter, and it is not in very good shape. Mr. Stookey is here, and I want to prove the number of employees the Department had during the years 1929 to date. Mr. Stookey can take that off and make

a statement of it and put the statement in. That would save a little time.

Mr. Hannan: He is doing that now, I believe, or could do it. I don't know, I am not trying——

(Interrupted.)

Mr. daPonte: Is that satisfactory?

Mr. Hannan: Better put him on.

Mr. daPonte: Take your payroll document, then, and be sworn.

[fol. 83] Mr. C. S. Stookey, being a witness called on behalf of plaintiff, Northern Pacific Railway Company, after having been first duly sworn, testified as follows:

Direct examination.

By Mr. daPonte:

Q. Mr. Stookey, you are the auditor of the Department of Public Works?

A. I am.

Q. You have the pay rolls, have you, of the Department for the years 1929 to date?

A. Yes, sir, I have the transcript.

Q. State approximately the number of employees the Department had in its various divisions for the years 1929 to date. I don't care for the exact number. If it varies from month to month, just state about how it was.

Mr. Hannan: I object to that, your Honor please, as being incompetent, irrelevant, and immaterial. The number on pay rolls in the various departments is immaterial in the matter. I object to the introduction of the testimony.

The Court: It seems to me the objection is well taken. The only thing we are interested in here is whether this amount that is collected is in excess of necessary inspection fees.

Mr. daPonte: No, Your Honor, that isn't the question we have here. We aren't going into that except as shown by the record. Our position is that this is a flat fee levied to pay all of these activities, and that is an invalid act on its [fol. 84] face. It is supplementary to that, and I doubt if it is necessary to my contention, but I thought for reen-

forcing the argument, it would be necessary to show that. I am not going into the cost of regulating railroads. It couldn't be proven. There are no records available.

The Court: All right.

Mr. daPonte:

Q. Just state, Mr. Stookey——

A. I have the total number of employes for each month, but not by sections.

Q. You have kept no records, then, of the number of employes in each of its divisions?

A. Yes, we have a record of that. It isn't divided in divisions. It would have to be picked out.

Q. Your employes devote their time to all of the activities of the Department?

A. That is not a question for me to answer.

Q. For instance, you have no employee who devotes all of his time to steamboats, or railroads, or auto vehicles, or other subdivisions?

A. I think there are, but I wouldn't say positively.

Q. Do you know what they are?

A. I wouldn't care to answer that, no. I am not in a position to.

Q. State the number of employes you have that—you can give the annual average.

A. I will give the annual average. The 1929 average, annual average employes, was 43; 1930 was 40; 1931, 38; [fol. 85] 1932, 42; 1933, 95; and for the first 11 months of 1934, 142.

Q. How is the Department divided, into what kind of divisions? That is, there is a transportation division?

A. Yes, engineering section, transportation section, motor vehicle section, and general office.

Q. Is there a public utility section?

A. Commonly known as the engineering section, yes.

Q. And since the Act of 1929 took effect, as I understand it, the Department's expenses are all paid out of this so-called revolving fund?

A. Yes, since we have no general fund appropriation, and since the auto transportation was incorporated with it, all of it has been from the public service revolving fund.

Q. Made up by the fees paid in by the various utilities, paid in by motor vehicles and automobiles subject to the Department's jurisdiction?

A. Yes, of all those fees.

Q. So the revolving fund is made up of the fees paid under the Statute of 1929, and the statute relating to motor vehicles, etc.?

A. Yes, all statutes which provide for fees to be paid the Department. Of course, we have miscellaneous fees and various kinds.

Q. All of the Department's expenses are paid, indiscriminately, out of this revolving fund?

A. Yes, that appropriation.

Q. How many different fees are paid into the Department, Mr. Stookey? That is, how many different sources? [fol. 85-a] A. If I would be allowed to get a book over there——

Q. Do you want a report?

A. Have you the late report?

Q. 1933, here.

A. You want me just to say how many different classes of fees?

Q. Yes, and what they are.

A. Well, the certified auto transportation.

Mr. Hannan: What is the document being used now?

Mr. daPonte: 1933 Annual report.

Mr. Hannan: One of those put in?

Mr. daPonte: Yes.

Mr. Hannan: Where?

A. Last page.

Mr. daPonte: There is a financial statement at the last of each of these reports.

A. Certified auto transportation companies pay two kinds of fees, gross revenue fees and application fees, and we have the annual report filing fees. The new permit law pays three classes of fees, gross revenue fees, application fees, and plate fees. Storage warehouses pay two classes of fees, gross revenue and application fees. We have scale test fees. We did have utility overcharge fees. That is no longer a law.

Q. Repealed that statute?

A. Yes.

Q. That was the amount of ten per cent the Department charged for deducting reparation charges and making orders of reparation against defendants, and they got ten per cent of the amount awarded?

[fol. 86] A. That is correct. We have miscellaneous fees of various kinds which I will group together. Certified boat fees includes gross revenue and application fees. And then we have the assessment of special case costs.

Q. That is under this last statute? It is proposed to assess the cost of the Department's investigations against the utility being investigated?

A. Yes, sir.

Q. That doesn't apply to railroads?

A. It doesn't so far, I don't believe.

Q. It isn't considered to be?

A. I don't know.

Mr. Hannan: I think that is a matter of law.

Mr. daPonte:

Q. This auto vehicle fee, do you keep a separate account of the receipts and disbursements chargeable to the auto vehicles?

A. Yes, sir.

Q. You are able to tell what the cost of their regulation or supervision by the Department was for any year?

A. Well, I wouldn't say for any year, no. There was a while in there we didn't keep those costs. It is really supplemental to the bookkeeping system and has never been required.

Q. What year do you have that for? Have you ever kept them?

A. Yes, I have it there. I would have to get my papers.

Q. Do you know what the amount is?

A. Yes, I have the amount.

Q. Don't you, under the statute which requires it, keep an account of the regulating and supervising of these auto [fol. 87] vehicles so the amount will be neither more nor less than the amount of the cost?

A. No, that clause has been amended.

Q. It is amended now?

A. Yes.

Q. When?

A. I think Chapter 166.

Q. That is the 1933 Legislature?

A. Yes.

Q. Prior to that time, did you keep that record?

A. Yes, I kept some record. I am not sure I have it there now.

Q. Have you the cost of regulating steamboats in comparison to the fees they pay?

A. Yes, sir.

Q. Have you kept that separately?

A. Yes, I did.

Q. In this report you referred to, these fees, which item includes the railroad fees?

A. That is the report filing fees.

Q. This is the report of the railroads?

A. That is all annual reports filed; that is one-tenth of one percent.

Mr. Matthias: That includes the gross revenue fee we are seeking to recover here?

A. Yes, sir.

Mr. daPonte:

Q. These filing fees are put in by, or paid by, the railroads and the utilities, and the utility companies include the telephone companies, water companies, gas companies, [fol. 88] power companies——

A. That is correct.

Q. They are described in the statute: And that fund is one consolidated fund, is it not?

A. The fee is the same covering all of them, one-tenth of one percent.

Q. You use that fee paid in by all of them, providing for the cost of supervision of the railroad companies and these utility companies, that is the way you run it?

A. It is all put in the same fund and drawn out in the same fund.

Q. No account is kept, for instance, of power companies, of their cost of regulation?

A. I have figures on it, yes.

Q. It is figures you made for yourself?

A. Yes, it is not required by law.

Q. The same is true of the railroad companies and telephone companies?

A. Yes.

Q. Did you make any distinction between the cost of various kinds of activities which the Department carries on in relation to railroads? That is, did you keep any account of the cost of rate hearings as distinguished from the cost of these reparation costs?

A. No

Q. In other words, to make a long story short, you made no distinction in your accounts between the cost of any of the various activities of the Department in relation to railroads, but lumped them all together as part of the expense?

[fol. 89] A. If it was a railroad charge, I considered it a railroad charge and didn't consider the nature of it, whether it was a rate hearing, an I. C. C. case or——

Q. You made no attempt to ascertain the cost of litigation the Department is carying on before the Interstate Commerce Commission of late years?

A. No.

Q. It has participated in the cases before the Commission, hasn't it?

A. Yes, sir.

Q. Those were expensive proceedings, going on for many years?

Mr. Hannan: I am——

A. I know there has been a bunch. Docket 17,000.

Mr. daPonte:

Q. It has been going on for a number of years?

A. Yes.

Q. Mr. Stookey, you didn't finish giving—— Yes, you gave us the employes for the various years, didn't you?

A. Yes.

Mr. daPonte: That will be all of the plaintiff's with the understanding that when the 1934 reports are in, we can file that.

[fol. 90] Cross-examination.

By Mr. Hannan:

Q. Mr. Stookey, Docket 17,000 was a railroad case, wasn't it, involving railroad fees?
A. Yes, I always assumed it was a railroad case.

Mr. daPonte: It was.

Mr. Hannan:

Q. What do you mean by reparation cases? I believe you testified on direct there were some reparation cases.

Mr. daPonte: I agree with you those reparation cases were brought to recover refund on excessive charges.
Mr. Hannan: And those involved railroads, also.
Mr. daPonte: Yes.

A. You mean the overhead charge a mile.

Mr. Hannan:

Q. You say they paid alike, one-tenth of one per cent? That isn't the same for certain holders, is it?
A. No, they pay one percent.

Mr. Hannan: That is all.

(Witness excused.)

Offer in Evidence

Mr. Matthias: I want to offer, then, as Exhibit 12, a statement of—prepared by the Tax Commission, sent to me by Mr. Hannan, showing the miles of track operated by the Great Northern; revenues; amount of stock authorized, both system and interstate and intrastate; and the actual value and equalized value for ad valorem tax pur-
[fol. 91] poses as fixed by the State, for all the years mentioned.

The Court: That will be 12.

(Statement admitted in evidence and marked Plaintiff Great Northern Exhibit No. 12.)

Mr. Matthias: Mr. Hannan, I find you, and I believe inadvertently, denied we had in all of the years paid the license fees required by law entitling us to sue. Since those are the fees we are suing on, they must have been paid.

Mr. Hannan: It is. The complainant shows they paid all these under protest. They paid nothing through the Secretary of State. They paid it all to the Department of Public Works because it exceeded the Secretary of State fees.

Mr. Matthias: I see.

Mr. daPonte: That would be straightened out now, wouldn't it, since we waived the rights under the other laws. The $1500 would exceed the amount payable to the Secretary of State substantially for us.

Mr. Matthias: I think that is all.

Mr. daPonte: We have rested.

Mr. Hannan: The defendant rests, also.

Mr. Matthias: I think before the record is closed it ought to be understood for future purposes that these four cases are all consolidated, both for the purposes of trial and appeal, will they be, because we have one set of exhibits [fol. 92] here and can't very well get out of it.

Mr. daPonte: One transcript of testimony, and one record of appeal, and one clerk's transcript, if either party has to appeal it.

Mr. Hannan: Separate notices of appeal.

Mr. daPonte: Separate notices of appeal, and separate appeal bonds, but only one clerk's transcript and one stenographer's transcript—one statement of facts, and separate clerk's transcript.

(Whereupon, the case was formally closed.)

(At 2:15 p. m. on Thursday, January 3, 1935, the above entitled cases were reopened for the introduction of further testimony, and the following proceedings were had and testimony taken, to-wit:)

Mr. Hannan: Your Honor, at the reopening of the case, Your Honor ruled to permit me to introduce some testimony in defense. I call Mr. Stookey to the stand.

MR. C. S. STOOKEY, being a witness called on behalf of defendant, having been previously duly sworn, testified as follows:

Direct examination.

By Mr. Hannan:

Q. You are the auditor of the Department of Public Works?

[fol. 93] A. I am.

Q. You are the man who testified for the plaintiffs here in this cause?

A. Yes, sir.

Q. How long have you been auditor of the Department?

A. Since June, 1920.

Q. Mr. Stookey, have you made an examination of the records of the Department for the years 1929, 1930, 1931, and 1932, and '33, in regard to the railroads?

A. Yes, sir.

Q. Have you made a computation as to how much the railroads have paid in those years and how much has been expended by the Department on the railroad part of the Department of Public Works?

A. Yes, sir.

Q. Tell us what they are by years.

A. Receipts, 1929 calendar year from the railroads, $30,640.12, and expenses chargeable to railroads for the fiscal year April 1, 1929 to March 31, 1930, were $34,284.60. Receipts—— (Interrupted.)

Q. 1930?

A. Calendar year 1930, $25,788.12; disbursements, 1930 fiscal year, $43,795.28. Receipts for 1931 calendar year, $19,953.57; disbursements for the 1931 fiscal year, $27,101.61. Receipts for the 1932 calendar year, $12,921.52; disbursements for the 1932 fiscal year, $24,856.90. Receipts for the 1933 calendar year, $12,247.58; disbursements for the 1933 fiscal year, $9,245.66.

Q. Have you the total for all that?

A. I have the accumulative excess of disbursements over [fol. 94] receipts for that period.

Q. How much is it?

A. Which amounts to $37,833.14.

Q. Do your charges for disbursements include anything

for legal services of the Attorney General's Office in regulating the railroads, or any of those other departments?

A. No, sir, just for funds expended from our appropriations.

Q. Did you consider anything for the consideration of the State Treasurer or State Auditor in regard to those funds in state regulation?

A. No, sir.

Q. Did you include anything for the auditing of the Department's books by the Department of Efficiency auditor?

A. No, sir.

Q. You got your figures from the books of the company?

A. The Department of Public Works.

Cross-examination.

By Mr. daPonte:

Q. When did you make these figures?

A. I started making the figures around 1924; however, these are later figures. These figures I have compiled, the latter part of them, within the last month I should judge.

Q. These accounts were not kept currently from year to year?

A. Yes, I had them in the files in case I needed them.

Q. Why did you make them?

A. Originally, I made them before the one-tenth of one per cent law went in, to see about how the expenses were [fol. 95] running between the various classes of utilities.

Q. Who furnished you the figures from which you made these compilations?

A. As to salaries, they were furnished by each individual. Each month, an individual turns in a slip to me prorating his salary for the month to each class.

Q. Something he did himself?

A. Yes.

Q. For himself?

A. Yes.

Q. Do you know whether he correctly pro-rated them or not?

A. No.

Q. It was no part of his official duties to make a prorata?

A. No, it was a request by me, and I checked to see they were turned in each month.

Q. Those figures were not required by any law to be kept?

A. No, not even by the Department.

Q. Just some private memoranda you kept for your information?

A. For the information of the Department if it should ever be needed.

Q. What use would the Department have for them?

A. For just such a case as this, is likely to come up at any time.

Q. It was not of use on this class?

A. We had to keep it on motor vehicles and boats, and kept it for this, too.

Q. Because we had a statute on motor vehicles and boats that provided the tax be regulated by costs?

A. Yes.

Q. There was no such statute for railroads or utility [fol. 96] companies?

A. No.

Q. They are not official in the sense of any rule, or order or rule of the Department that required them to be kept?

A. No.

Q. They are based on the proration of time handed in to you by the various employes of the Department?

A. Yes.

Mr. daPonte: I move to strike the witness's testimony. It is based on hearsay. It was no part of his duty to keep these figures, and no part of the duty of the men from whom he obtained the figures to keep them. It is his own private memoranda, kept out of curiosity, apparently, by Mr. Stookey, not official figures at all.

Redirect examination.

By Mr. Hannan:

Q. Were that compilation and figures kept in the Department's files?

A. Yes, sir.

Q. You did that on the Department's time under your salary as Auditor?

A. Yes, sir.

Q. They have always been at the disposal of the Department?

A. Yes, sir.

Q. You started to keep them for the benefit of the Department in determining the one-tenth of one per cent law?

A. Yes, sir.

[fol. 97] Q. As to how much tax?

A. Yes, sir.

Q. And continued keeping them?

A. Yes.

Mr. daPonte: You say you started before there was any one-tenth of one per cent tax?

A. Yes.

Mr. Hannan:

Q. You were never ordered to discontinue?

A. No, sir. We have had various directors since then.

Q. Invariably the employes handed this information to you?

Mr. daPonte: Don't lead your witness. My objection is—— (Interrupted.)

Mr. Hannan: I withdraw the question.

Q. Mr. Stookey, who handed in the information to you that you compiled this record from?

Mr. daPonte: That has been gone over. I think we understand it.

Mr. Hannan: It won't hurt you, then.

A. This material was handed in by each employe.

Q. What do you mean by employe?

A. Anyone on the Department payroll was supposed to hand me one each month.

Q. Did it include the supervisors?

A. The supervisors, but not the directors.

Mr. daPonte: I would like to have Mr. Stookey produce the slips from which he made—— (Interrupted.)

A. What do you want?

Mr. daPonte: I want the memoranda produced from [fol. 98] which you made the figures you just testified to.

A. We would have to move the entire office up here.

Mr. daPonte: I don't think you would have to do that.
Mr. Hannan: I think certified copies are usual.

A. I have several files these are drawn from. These are my working figures from the sheets turned in by the employes. These are open for inspection.

Recross-examination.

By Mr. daPonte:

Q. You have no knowledge of your own whether the figures turned in by the employees are correct or not?

A. No.

Q. He just told you at the end of the month what proportion of his time he was engaged in working on a railroad matter or some other matter?

A. He don't tell me. He made out a statement signed, under his signature.

Q. How did it read? One-third, or one-fourth of my time?

A. I have here one of the forms used.

Q. Let's see that. Now—— (Interrupted.)

A. I might state that over to the double line is a complete report in itself; to the right of the double line is for special cases. That is where one class of utilities possibly has several special cases an employe works on during the month.

Q. I notice here, according to your compilation, you have received from railroads $25,000, and expenses, disbursements chargeable to railroads, $43,000.

A. That is correct.

[fol. 98a] Q. Where did you get the money to pay the $43,000, that excess?

A. Out of the Public Service Revolving Fund.

Q. You took that from somebody else?

A. It is all in the same pot. It can't come out even.

Q. It was never calculated with the cost of regulating any particular class of utility?

A. Yes, sir, that is what it is for.

Q. Who calculated them on that?

A. I did.

Q. According to that, all cost the same, one-tenth of one percent of the gross income. How do you explain that?

A. It is not up to me to explain it. That is the figures here, and that is the law passed.

Q. That is a remarkable coincidence that the fee was fixed.

A. That is about the best average.

Q. Each and every one stands one-tenth of one percent?

A. No, my figures didn't say that.

Q. This fee never was fixed with reference to cost, was it, and couldn't be?

A. All I can say is—— (Interrupted.)

Q. Answer the question.

Mr. Hannan: I object to that as a conclusion, and incompetent, irrelevant, and immaterial, and not a proper question.

Mr. daPonte:

Q. You said you did the work, and are you telling us the—are you trying to tell us this tenth of one percent was ever fixed with reference to the cost of supervising and regulating these respective utilities?

[fol. 99] A. It was fixed by the legislature. I can't understand that question.

Q. Do you know what that means?

A. No.

Q. Was this fee fixed by you, as far as you know, Mr. Stookey, at a time that would approximate the cost of regulating and supervising by the Department, these various classes of utilities? You understand that, don't you?

A. No, I don't understand your question.

Q. You really don't?

A. No, I can't figure it out.

Q. Do you speak English?

A. Sometimes.

Q. I will ask you again, was the amount of this fee paid by the railroads and other utilities calculated in order to be approximately equal to the cost of supervising and regulating each class of corporation?

A. That was the idea, yes.

Q. Whose idea was that?

A. The idea of the legislature, I take it.

Q. I am talking about as far as you know.

A. I only know what work I have done on it.

Q. Did you turn in to the legislature, or anybody else, any figures to show that at that time it would cost a tenth of one percent of the gross income?

A. I didn't have anything to do with that. That was up to the director.

Q. So you turned in some figures, and someone else made calculations of what the percentage of gross income should be?

[fol. 100] A. Yes.

Q. You know the expenses vary greatly from year to year?

A. Yes.

Q. There is no provision and no record to adjust the cost yearly, to adjust the fee?

A. The fee is a flat one tenth—— (Interrupted)

Q. And it all goes into one fund?

A. Yes.

Q. No matter what the cost of regulating railroads is, you are going to pay the entire amount, whether more or less, out of one pot?

A. Yes.

Q. Now, have you any figures to show what was the cost of the Department's proceedings, litigant before the Interstate Commerce Commission, as to railroad matters?

A. I have never compiled that.

Q. Never kept any records on that?

A. The original records on the vouchers is all.

Q. This time turned in by the employes took no account of the kind of work they were doing as to the regulation of railroads?

A. No, only as to special cases.

Q. If it was a special case, there was a note as to what it was?

A. Yes, sir.

Q. Those expenses are all in the figures charged to railroads?

A. Yes, sir.

Q. Which one of these utilities has a surplus to its credit? You say the railroad has a surplus against it, an overrun; [fol. 101] which one has a surplus to its credit?

A. I don't know. All I picked out was the railroads. I have the rest of them here.

Q. You have never made a balanced figure showing this class, say telephones, has so much to its credit, and railroads has so much in the red, or anything like that?

A. No, I haven't that available.

Q. It just happened you made up the figures for railroads?

A. Yes, sir.

Q. Because this suit was brought?

A. Correct.

Q. If some other utility brings a suit, you will concoct these figures?

A. Out of the records, not out of my head.

Q. You would produce some figures?

A. I would make them up to date.

Q. So the Department is prepared to furnish some figures to show any one of the utilities costs more than they have paid in?

A. After all, the figures have to balance, you know.

Q. You have never balanced them?

A. I can balance them.

Q. How long would it take you?

A. Two or three days at least.

Q. That is just the records. They are not kept currently?

A. No.

Q. Now, let's take the payroll here for the year 1933. Have you got that with you?

A. I left it down there.

Q. Let's see any month, the month of June, 1933, for in-
[fol. 102] stance, would do. Before we get to that, was it your idea that this— Did you keep these figures with the idea that this statute would be invalid unless it was limited to the cost of regulating railroads?

A. No, sir.

Q. I can't see then, what interest it was to you to keep it up since the law of 1929 was passed.

A. One reason was because the railroads have been contesting the fees for the last four or five years.

Q. Why for the telephone companies? They haven't contested the fees.

A. I am not positive. Someone did.

Q. You kept it for companies whether protested or not?

A. Yes, sir.

Q. You didn't keep it for railroads because they protested, did you?

A. Not necessarily, some others might at any time.

Q. In other words, you thought they might have room for protest?

A. We have to be ready whether they protest or not. Do you want June, 1933?

Q. Yes. How many employes are listed on here, 1933?

A. 102.

Q. How many on there have anything to do with railroads?

A. Do you want me to name them off?

Q. No, how many in number. You can give the names if you want to.

A. The director is interested in railroads, naturally, being director.

Q. Along with everybody else.

[fol. 103] A. And naturally, the supervisor of transportation, Mr. Lane.

Q. That is in connection with railroads and everybody else. How many of these were exclusively connected with railroads?

A. I wouldn't say any were exclusively connected with railroads.

Q. How many of those the greatest part of the time is connected with railroads?

A. Mr. Lonergan.

Q. He is chief of transportation?

A. Yes, sir.

Q. He has under his jurisdiction all transportation companies?

A. I presume so. I wouldn't say.

Q. You have given some figures here. He has to do with the stages and trucks, doesn't he?

A. I presume he has something to do with them, yes.

Q. He turned in the slips to you, didn't he? He turned the slips in to you? He has duties in relation to them?

A. Yes, sir.

Q. And has duties in relation to steamboat companies?

A. Yes, sir.

Q. And all transportation companies?

A. I think so.

Q. He has charge of the Interstate Commerce Commission, doesn't he?

A. He has turned in several charges against it.

Q. Isn't it a fact in the last year, Mr. Lonergan hasn't devoted ten percent of his time to the railroad companies? [fol. 104] A. No.

Q. He has been with stages and trucks most of the time?

A. I don't think so.

Q. Where are your records for 1933?

A. I would have to get his compilation and slips for 1933.

Q. How much charged against railroads is Lonergan's salary in the figure you turned in?

A. I don't know. I would have to produce the sheets.

Q. Could you go and get your sheets for 1933 and show how you computed that figure?

A. Yes, sir.

Q. Will you do that?

A. Yes, sir. The year 1933?

Q. Take the year 1933 and show what that includes.

A. I can show you the salary charges. Do you want the expenses, too?

Q. You have turned in some figures here.

A. I couldn't move the whole office up here.

COLLOQUY

Mr. daPonte: I think we should have that, Your Honor. These lack official standing, and if Your Honor rules they are admissible, I want to show what the witness is proper to charge and what is not. What charges were made are left to the discretion either of some clerk or employe who assigns his time to suit himself, and whether he decided the question rightly or wrongly is a matter Your Honor would have to decide. That is why I say this is all extra-official. It has done nothing but satisfied the curiosity of Mr. [fol. 105] Stookey if somebody delved into it. But if that is a material question, it should be decided, and I would like to examine into what the charges are.

The Court: I might express my view. So far as this court is concerned, it is not material, but if you want it in the record—— (Interrupted)

Mr. daPonte: No, I don't want it in. It would be impossible for a clerk to determine the question of law as to what

were proper expenses to be charged to this or that corporation, and there is no check or order on him to distribute around him. If that was true, none of the utilities, if they had double the amount of money each particular class spent, when they brought suit would be found in the red.

Mr. Hannan: Is that Your Honor's idea, that it was not material, any of this testimony of Mr. Stookey, testified to, was not material in the matter?

The Court: It is my view that this whole matter is purely a question of law.

Mr. Hannan: It is mine, too, but they went into the fact.

The Court: It was my suggestion. I didn't want the case to come back here.

Mr. daPonte: We didn't put in testimony of the amount of fees of the railroad, or the charges against them.

[fol. 106] Mr. Hannan: The amount of the fees and the amount of the surplus, and we have a right to—it is the right of the Department to testify to the particular part of it if this is admissible.

Mr. daPonte: My contention is that the law is invalid on its face, is the point I made, and I didn't go into the cost of operating railroads, or the way it is distributed, or the expense.

That is all, Mr. Stookey.

I am satisfied with the ruling.

Mr. Hannan: I take an exception.

(Witness excused.)

Mr. Hannan: That is all the testimony we have.

Mr. daPonte: We have no further testimony.

(Whereupon, the cases were closed and no further testimony was taken.)

[fol. 107] (At the hour of 10:30 a. m. on Monday, the 1st day of April, A. D. 1935, the above entitled cases were reopened and the following proceedings were had in accordance with stipulation between counsel and ruling of the Court during the procedings on January 3, 1935, as recorded on page 14 of this statement:)

OFFER IN EVIDENCE

Mr. daPonte: According to the stipulation of counsel and leave of the Court, Plaintiff files printed copy of the Four-

teenth Annual Report of the Department to the Governor, being the report for the year ending November 30, 1934.

Mr. Hannan: As in the consolidated cases.

(Fourteenth Annual Report of the Department of Public Works to the Governor admitted in evidence and marked Plaintiffs' Exhibit No. 13.)

(Whereupon, the cases were closed and no further proceedings were had or testimony taken.)

[fol. 108] IN SUPERIOR COURT OF THURSTON COUNTY

ORDER SETTLING STATEMENT OF FACTS

On this 17th day of June A. D., 1935, pursuant to due notice of application for settlement and certification of the Statement of Facts in the foregoing entitled action, the undersigned, Honorable D. F. Wright, Judge of said court presiding at the trial of said action, now hereby settles the annexed and foregoing Statement of Facts as the Statement of Facts in the said action and hereby certifies:

That the matters and proceedings embodied in the annexed and foregoing Statement of Facts, exhibits and other written evidence introduced and offered in evidence upon the trial of said action, and filed in said cause and now marked and identified by me as follows: Plaintiffs' Exhibits Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 11, 12 and 13; referred to and identified in the foregoing proposed Statement of Facts, are matters and proceednigs occurring in said cause, and the same are hereby made a part of the record therein; and that the same contain all the testimony on which said cause was tried; evidence produced or offered by either of the parties to said action, together with all of the objections and exceptions of counsel, taken to the reception or rejection of testimony, and the rulings of the Court therein, all documents and instruments in writing introduced or offered in evidence, and all the material facts, matters and proceedings heretofore occurring in said cause, and not already a part therein; and the Clerk is hereby ordered to attach to the said Statement all of the said original ex-

hibits on file in said cause as herein identified, and which the Clerk of this court is ordered to transmit to the Clerk of the Supreme Court.

Done in open court this 17th day of June, A. D. 1935.

D. F. Wright, Judge.

O. K. —— ——, Attorneys for ——.

[fol. 109] [File endorsement omitted]

IN SUPERIOR COURT OF THURSTON COUNTY

[Title omitted]

NOTICE OF APPEAL—Filed April 29, 1935

To Great Northern Railway Company herein and to Thomas Balmer and Edwin C. Matthias, your attorneys of record in the above entitled cause:

You and each of you, are hereby notified that the defendant has appealed and hereby does appeal to the supreme court of the State of Washington from the judgment in favor of the plaintiff heretofore, herein rendered and entered by the superior court of the State of Washington for Thurston County on the 1st day of April, 1935 and from each and every part and parcel of said judgment and the whole thereof.

Dated this — day of April, 1935.

G. W. Hamilton, Attorney General; Geo. G. Hannan, Assistant Attorney General, Attorneys for Defendant.

Service of the above and foregoing notice and receipt of copy thereof is hereby admitted this 27th day of April, 1935.

Thomas Balmer, Edwin C. Matthias, Attorneys for the Plaintiff.

[fol. 110] IN SUPREME COURT OF WASHINGTON

No. 25732. Department One

GREAT NORTHERN RAILWAY COMPANY, a Corporation, Respondent,

v.

THE STATE OF WASHINGTON, Appellant

OPINION—Filed Dec. 12, 1935

This is an action to recover an alleged excess of fees exacted by the state and paid under protest by the plaintiff to the department of public works. Upon a trial by the court, findings of fact and conclusions of law were made, based upon which the court entered judgment for plaintiff. The state has appealed.

At its 1929 session, the legislature enacted chapter 107, Laws of 1929, p. 209 (amending Sec. 1 of Chapter 113, Laws of 1921, p. 354, as amended by Sec. 1, Chapter 107, Laws of 1923, p. 290). The 1929 act, which is in question here, consists of one section and reads as follows:

"That hereafter every person, firm or corporation engaged in business as a public utility and subject to regulation as to rates and charges by the department of public works, except auto transportation companies and steamboat companies holding certificates under sections 10361-1 and 10361-2, shall, on or before the first day of April of each year, file with the department of public works a statement on oath showing its gross operating revenue for the preceding calendar year or portion thereof and pay to the department of public works a fee of 1/10 of one per cent of such gross operating revenue: Provided, That the fee so paid shall in no case be less than ten dollars." Rem. Rev. Stat., Sec. 10417 (P. C. Sec. 5637-1).

[fol. 111] Section 2 of chapter 113, Laws of 1921, p. 354, Rem. Rev. Stat., Sec. 10418 (P. C. Sec. 5637-2), which must be read in connection with the 1929 act, provides that such fees, when collected, shall be paid to the state treasurer and by him deposited in a fund known as the public service revolving fund.

Respondent paid the required fees annually as they became due, but under protest, claiming that the 1929 act, above set forth, was void. This action was begun in March, 1933, to recover the fees paid for the years 1929 to 1932, inclusive, less the amounts admittedly due for those years under other applicable statutes, namely, chapter 107, Laws of 1923, p. 290, Rem. 1927 Sup., Sec. 10417, and chapter 227, Laws of 1929, p. 631, Rem. Rev. Stat., Sec. 3636-1 to 3636-8, inclusive. By stipulation of the parties made during the course of the trial, the complaint was amended to cover the alleged excess of the 1933 fee, which had also been paid under protest.

The court held the 1929 act to be unconstitutional on its face. For the purpose of the record, however, the court admitted evidence tending to show the operative effect of the act, and from such evidence found and concluded that the fees collected by the department were unreasonable and bore no just relation to the cost of regulation and inspection of railroads. Upon these two grounds, the court entered judgment for recovery of the excess amounts of the fees paid. Two questions are thus presented to us for determination: (1) Whether the act is unconstitutional on its face, and (2) whether it is invalid because of its operative effect.

Respondent's main contention is that the act is void on its face, (1) because the fee, or tax, is not imposed for, nor [fol. 112] limited by, the reasonable cost of supervising and regulating railroad companies, but is a flat fee imposed on railroad companies, and many unrelated utility companies as well, to pay the expenses of regulating them all, in the aggregate; and (2) because the fee, or tax, is imposed, both on railroad companies and on many unrelated utility companies, to pay not only the expenses incident to their supervision and regulation, in general, but also the expenses of any and all duties and activities of the department, whether regulatory, administrative, police, or judicial. It is contended that because of its unlimited scope, as thus challenged, the act contravenes the fourteenth amendment of the constitution of the United States and also the fourteenth amendment of the constitution of the state of Washington.

The act appears upon its face to be a regulatory one, and this court has recently declared it to be such. Pacific Tel.

& Tel. Co. v. Seattle, 172 Wash. 649, 21 P. (2d) 721, affirmed in 291 U. S. 300, 54 St. Ct. 383, 78 L. Ed. 810. In that case it was also held by this court that the fund created by chapter 113, Laws of 1921, p. 354, Sec. 2, Rem. Rev. Stat., Sec. 10418 (P. C. Sec. 5637-2), supra, was solely for the purpose of defraying the expenses attendant upon the administration of the public service commission law. So we begin with the understanding that the act in question is intrinsically a regulatory one.

In considering the question of the constitutionality of a legislative act, two principles, well settled in this state, must be kept in mind. The first is this: The courts will presume that an act regularly passed by the legislature is a valid law, and they will not declare it unconstitutional unless it is clearly shown to be so. State v. Bowen & Co., 86 Wash. 23, 149 Pac. 330; Litchman v. Shannon, 90 Wash. 186, 155 Pac. 783; State ex rel. State Reclamation Board v. [fol. 113] Clausen, 110 Wash. 525, 188 Pac. 538; State ex rel. Carroll v. Superior Court, 113 Wash. 54, 193 Pac. 236.

The other principle is this: The courts will not take evidence as to the unconstitutionality of a legislative act, but will determine its constitutionality or unconstitutionality from matters that appear on the face of the act itself or from facts of which the courts may take judicial notice. Barker v. State Fish Commission, 88 Wash. 73, 152 Pac. 537; State ex rel. Govan v. Clausen, 108 Wash. 133, 183 Pac. 115; State ex rel. Trenholm v. Yelle, 174 Wash. 547, 25 P. (2d) 369; Ajax v. Gregory, 177 Wash. 465, 32 P. (2d) 560.

Nothing appears on the face of the act under consideration to indicate, or even suggest, that it is unconstitutional, and there are no facts, supplied by judicial notice, to give it that effect. The act imposes upon all utilities subject to regulation, with two exceptions, a fee, or tax, of one-tenth of one per cent of their gross operating revenues, the fees to be paid into the public service revolving fund. The two classes of excepted utilities are dealt with in other statutes similar in nature. Auto transportation companies pay into the revolving fund a fee, or tax, of one per cent of their gross operating revenues. Rem. Rev. Stat., Sec. 6395 (P. C. Sec. 234-11). Steamboat companies pay into the same fund a fee, or tax, of not to exceed one-fifth of one per cent of the amount of their gross operating revenues. Rem. Rev. Stat., Sec. 10361-2 (P. C. Sec. 5552-2).

The purpose of the present act being, in our opinion, apparent on its face as one of regulation, and having been so judicially declared, it must be presumed that the legislature was in possession of advisory facts on which it proceeded when passing the act. It must further be presumed that from the information possessed by it the legislature [fol. 114] concluded that the amount of the fees, as determined by the prescribed rates of percentage, was reasonably necessary to meet the cost of supervising and regulating the respective utilities. We are convinced that the act cannot be declared to be unconstitutional on its face or from facts of which the court can take judicial notice.

Respondent's second contention is that the invalidity of the act was established by the evidence produced upon the trial. Respondent's contention upon this phase of the case, as we understand it, is that evidence is admissible, not so much for the purpose of showing that an act is unconstitutional in its inception, or upon its face, but, rather, to show that the act has become invalid because of its intentional result or by its operative effect. There is eminent authority supporting the principle upon which that contention is based. Foote & Co. v. Stanley, 232 U. S. 494, 34 S. Ct. 377, 58 L. Ed. 698; Pure Oil Co. v. Minnesota, 248 U. S. 158, 39 S. Ct. 35, 63 L. Ed. 180; Standard Oil Co. v. Graves, 249 U. S. 389, 39 S. Ct. 320, 63 L. Ed. 662; Appalachian Coals, Inc. v. United States, 288 U. S. 344, 378, 53 S. Ct. 471, 77 L. Ed. 825; Wofford Oil Co. v. Smith, 263 Fed. 396; Cleveland Refining Co. v. Phipps, 277 Fed. 463; Lugo v. Suazo, 59 Fed. (2d) 386; State v. Bartles Oil Co., 132 Minn. 138, 155 N. W. 1035, L. R. A. 1916D, 193; State v. Standard Oil Co., 100 Neb. 826, 161 N. W. 537; Century Oil Co. v. Dept. of Agriculture, 112 Neb. 73, 198 N. W. 569. It will be found that most of these cases rest upon the commerce clauses of the United States Constitution, Art. I, Secs. 8, 10.

In the Foote case, supra, cited in many of the others, a clear and definite statement of the extent and effect of the principle is given, from which we excerpt a liberal quotation:

"Inspection necessarily involves expense and the power to fix the fee, to cover that expense, is left primary to the [fol. 115] legislature which must exercise discretion in determining the amount to be charged, since it is impossible

to tell exactly how much will be realized under the future operations of any law. Beside, receipts and disbursements may so vary from time to time that the surplus of one year may be needed to supply the deficiency of another. If, therefore, the fees exceed cost by a sum not unreasonable, no question can arise as to the validity of the tax so far as the amount of the charge is concerned. And even if it appears that the sum collected is beyond what is needed for inspection expenses, the courts do not interfere, immediately on application, because of the presumption that the Legislature will reduce the fees to a proper sum. Red 'C' Oil Co. v. North Carolina, 222 U. S. 380, 393. But when the facts show that what was known to be an unnecessary amount has been levied, or that what has proved to be an unreasonable charge is continued, then, they are obliged to act in the light of those facts and to give effect to the provision of the Constitution prohibiting the collection by a State of more than is necessary for executing its inspection laws. In such inquiry they treat the fees fixed by the Legislature for inspection proper as *prima facie* reasonable and do not enter into any nice calculation as to the difference between cost and collection; nor will they declare the fees to be excessive unless it is made clearly to appear that they are obviously and largely beyond what is needed to pay for the inspection services rendered. Still, effect must be given to the provision of the Constitution, which, in unusual and emphatic terms, permits the State to collect only what is 'absolutely necessary.' If, therefore, it is shown, that the fees are disproportionate to the service rendered; or, that they include the cost of something beyond legitimate inspection to determine quality and condition, the tax must be declared void because such costs, by necessary operation obstruct the freedom of commerce among the States. (Citing cases)."

But assuming that the principle just adverted to has legal acceptance and that there are instances in which it may properly be applied, we apprehend that this case was not submitted to the court, nor decided by it, upon that theory, and if it was, then we are further convinced that the evidence neither compels nor warrants a finding of invalidity of the act because of the result intended by the legislature or because of the operative effect of the act.

The record reveals that the court, at the conclusion of the trial, was of the view that the question was entirely one of law, and that the evidence, as submitted, was immaterial and irrelevant. That was the position taken by appellant's counsel from the beginning, and respondent's counsel appear to have finally conceded the point. In the progress of the trial, however, the court admitted the evidence for the purpose of completing the record, so to speak, and to obvi- [fol. 116] ate the possible necessity of being required to take evidence later on because of an adverse decision, on appeal, on the question of law. Although the court did make findings based on such evidence, from which certain conclusions were drawn, and upon which the judgment as entered was based, yet, as already stated, the court considered the question as essentially one of law and not one of fact, nor even as one of mixed law and fact. If we should likewise consider the matter as being solely one of law, then what we have already stated would necessarily dispose of this case, on the ground that the 1929 act is not unconstitutional on its face, nor to be declared so from facts of which we may take judicial knowledge.

However, since the record presents the case as one having a factual angle, we shall, for the purpose of the argument, consider that phase of it and express our view thereon.

This is a law action. The material allegations of the complaint were denied by the answer. The burden of proof, therefore, rested on the plaintiff, who is the respondent here. The evidence consisted entirely of documentary records and the testimony of one witness, the auditor of the department of public works. The documentary records consisted almost entirely of the annual reports of the department to the governor. Those reports gave a resume of the activities of the department and the expenses incident thereto. It is true that the reports did not show that the total amount of the expenses incurred was allocated to the respective classes of utilities in proportion to the cost of supervising and regulating each class; on the contrary, so far as is shown by the reports, all expenses of supervising and regulating the utilities, generally, were paid, as required, from the public service revolving fund, into which [fol. 117] the fees collected from the several utilities had been deposited. But the reports did show that a vast amount of supervision and regulation was necessary and

had been done with respect to railroads, as well as the other, and unrelated, utilities. The real controversy, on the question of fact in the case, was whether one-tenth of one per cent of the gross revenues of the railroads, from intrastate commerce, was more than was reasonably necessary to cover the cost and expense of railroad supervision and regulation. From what appears in the reports it could not be said dogmatically that the rate of percentage prescribed by the act was unnecessarily excessive. Indeed, it is contended by the respondent, and so found by the court, that inasmuch as the department was not required by law to keep, and in fact did not keep, an account of the expense of regulating and supervising railroads, separate and apart from the expense of supervising and regulating other public utilities, it was practically impossible at the time of the trial to make any intelligible segregation. But the difficulty attendant upon meeting the burden of proof does not obviate the necessity of it. The burden rested upon and remained with the respondent and did not, because of its difficulty, shift to the appellant. Not having met the burden imposed upon it, the respondent did not make a case for relief.

But, going even beyond that, the auditor testified that for years he had kept an account which showed that the cost of supervising and regulating the railroads of the state far exceeded the amount of the fees imposed upon them by the act. While the account kept by the auditor was not official, in the sense that of itself it was admissible in evidence, yet what the auditor did in that respect qualified him to testify as to the ultimate fact. Without further detailing the evidence, we will say that in our opinion, and in so far as [fol. 118] there was any evidence on the subject, it preponderated against the findings made by the court as to the cost of supervising and regulating railroads.

The mainspring of respondent's contention upon the immediate point is that many of the activities of the department are not supervisory or regulatory in nature but are administrative or judicial in character, and that the utilities cannot be required to pay fees which are used in part to carry on these latter functions. It may be admitted that if taxes, or fees, should be levied to pay for services in no way connected with public utilities, and at the same time such utilities were subjected to direct taxation upon their

properties for such purposes equally with other corporations, while the other corporations were not required to pay the prescribed taxes, or fees, then there would be just ground for complaint of unlawful discrimination against such public utilities. But that is not the case here.

Respondent takes altogether too narrow a view of the scope and purview of a supervisory or regulatory act, such as the one in question. The purpose of the act is not limited to mere inspection of railroad property, but is a much broader and more comprehensive one. Though railroads are private corporations, their uses are public. They exist for the convenience of the people in various kinds of transportation. They are given certain special privileges to be exercised in the interest of the public, and, to guarantee their performance, the railroads, like other public utilities, are made subject to regulation. Such regulation extends not only to matters affecting safety in transportation of passengers and freight, but also to matters affecting adequacy of transportation and reasonableness of rates. In [fol. 119] the very nature and necessity of things such regulation must have a broad field, the extent of which must be determined by legislative discretion. The power of regulation conferred upon the department of public works must be commensurate with the duties to be performed and the purposes to be lawfully effected. When the interests of the public and of individuals or corporations are blended in a service imposed by law, it is a matter of legislative discretion to determine who shall bear the cost and in what proportions. In Charlotte, C. & A. Railroad Co. v. Gibbes, 142 U. S. 386, 12 S. Ct. 255, 35 L. Ed. 1051, the supreme court of the United States, in speaking of a similar situation with reference to railroads, said:

"Being the recipients of special privileges from the State, to be exercised in the interest of the public, and assuming the obligations thus mentioned, their business is deemed affected with a public use, and to the extent of that use is subject to legislative regulation. Georgia Railroad & Banking Co. v. Smith, 128 U. S. 174, 179. That regulation may extend to all measures deemed essential not merely to secure the safety of passengers and freight, but to promote the convenience of the public in the transaction of business with them, and to prevent abuses by extortion-

ate charges and unjust discrimination. It may embrace a general supervision of the operation of their roads, which may be exercised by direct legislation commanding or forbidding, under severe penalties, the doing or omission of particular acts, or it may be exercised through commissioners specially appointed for that purpose. The mode or manner of regulation is a matter of legislative discretion. When exercised through commissioners, their services are for the benefit of the railroad corporations as well as of the public. Both are served by the required supervision over the roads and means of transportation, and there would seem to be no sound reason why the compensation of the commissioners in such case should not be met by the corporations, the operation of whose roads and the exercise of whose franchises are supervised. In exacting this there is no encroachment upon the Fourteenth Amendment. Requiring that the burden of a service deemed essential to the public, in consequence of the existence of the corporations and the exercise of privileges obtained at their request, should be borne by the corporations in relation to whom the service is rendered, and to whom it is useful, is neither denying to the corporations the equal protection of the laws or making unjust discrimination against them."

In the case now before us, the activities of the department [fol. 120] with respect to railroads, were, in our opinion, clearly within the field of proper supervision and regulation.

The judgment is reversed with direction to the trial court to dismiss the action.

Steinert, J.

We concur: Geraghty, J. Tolman, J. Blake, J. Mitchell, J.

[fol. 121] IN SUPREME COURT OF WASHINGTON

No. 25733. Department One

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation, Respondent,

v.

THE STATE OF WASHINGTON, Appellant

OPINION—Filed Dec. 12, 1935

PER CURIAM:

This case is companion to, and presents the same questions as were presented in, Great Northern Railway Company v. State of Washington, ante p. —. Upon the authority of that case, the judgment in this case is reversed, with direction to the trial court to dismiss the action.

[fol. 122] IN SUPREME COURT OF WASHINGTON

No. 25734. Department One

CHICAGO, MILWAUKEE, ST. PAUL and PACIFIC RAILROAD COMPANY, a Corporation, Respondent,

v.

THE STATE OF WASHINGTON, Appellant

OPINION—Filed Dec. 12, 1935

PER CURIAM:

This case is companion to, and presents the same questions as were presented in, Great Northern Railway Company v. State of Washington, ante p. —. Upon the authority of that case, the judgment in this case is reversed, with direction to the trial court to dismiss the action.

[fol. 123] [File endorsement omitted]

IN SUPREME COURT OF WASHINGTON

[Title omitted]

PETITION FOR REHEARING EN BANC—Filed Jan. 4, 1936

The respondent respectfully petitions the court to grant a rehearing and reargument of this case en banc, for the following reasons:

First. The case involves the important federal question whether Chapter 107, Washington Laws of 1929, contravenes the Fourteenth Amendment and Commerce Clause of the Constitution of the United States.

Second. The decision of Department One of this court upon this question is contrary to the decisions of the Supreme Court of the United States.

Third. Since an appeal to the Supreme Court of the United States is intended, due consideration both to that court and this requires the submission of the federal questions involved to the full bench of this court before its opinion becomes final.

In support of this petition respondent respectfully shows:

I

The court on page 547 of the departmental opinion, as reported in Volume 84, Washington Decisions, 545, et seq., correctly states respondent's main contention that the act is void on its face, "(1) because the fee, or tax, is not imposed for, nor limited by, the reasonable cost of supervising and regulating railroad companies, but is a flat fee im- [fol. 124] posed on railroad companies, and many unrelated utility companies as well, to pay the expenses of regulating them all, in the aggregate; and (2) because the fee, or tax, is imposed, both on railroad companies and on many unrelated utility companies, to pay not only the expenses incident to their supervision and regulation in general, but also the expenses of any and all duties and activities of the department, whether regulatory, administrative, police, or judicial."

The departmental opinion overrules these contentions on the stated ground that nothing appears on the face of the act to indicate that it is unconstitutional, and that it must "be presumed that, from the information possessed by it, the legislature concluded that the amount of the fees, as determined by the prescribed rates of percentage, was reasonably necessary to meet the cost of supervising and regulating the respective utilities."

This conclusion is opposed to the United States Supreme Court's decision in Charlotte, C. & A. R. Co. v. Gibbs, 142 U. S. 386, 35 L. Ed. 1051, and Foote & Co. v. Stanley, 232

U. S. 494, 59 L. Ed. 698. In the Gibbs case the court holds that while railroads may be charged with the reasonable cost of their own supervision and regulation, they cannot be charged, consistently with the federal constitution, with the cost of regulating other corporations or with the performance of duties which are not of a regulatory character. In Foote & Co. v. Stanley it is held that where a statute levies a flat tax to pay the cost of inspection—a legitimate purpose—and also to pay the cost of other services not in the nature of inspection, the act is void, because it appears on the face of the statute that it levies more than is necessary to pay the cost of those services for which the tax may lawfully be imposed.

The latter case also holds that "if the state imposes upon one set of officers the performance of the two duties, and [fol. 125] pays the whole or a part of the joint expense out of inspection fees, it must be made to appear that such tax does not materially exceed the cost of inspection—*the burden in such cases being on those seeking to collect the combined charge.*" (Italics supplied.)

This principle the departmental opinion ignores and supplants by a presumption that "the legislature concluded that the amount of the fees * * * was reasonably necessary to meet the cost of supervising and regulating the respective utilities."

When the Supreme Court of the United States holds that the burden of proof in such cases is upon those seeking to collect the combined charge, this court plainly errs in relieving the State of any burden by presuming that the Legislature acted reasonably. Rather should the presumption be, in view of the combined nature of the tax, that the Legislature acted unreasonably. The decision of the department is thus diametrically opposed to the position of the Supreme Court of the United States.

The findings of fact printed in our brief at pages 58 to 87 show in great detail the manifold and various duties of the Department of Public Works of a supervisory as well as of a non-supervisory nature, and show as well that in the performance of the latter the Department incurs large expenses payable out of the tax that we pay. These duties are laid upon the Department by law and are paid out of the taxes imposed by Chapter 107, Laws of 1929. We have then precisely the situation dealt with in the Foote case,

where legitimate and illegitimate expenses were sought to be imposed upon a taxpayer in a single flat fee or tax. The holding of the United States Supreme Court was that the State must show that the tax was reasonably necessary for the lawful purpose. This court in effect says in the departmental opinion that it will presume in favor of the State what the Federal Supreme Court says the State must show. By this reasoning the respondent is deprived of the [fol. 126] protection due it under the Federal Constitution.

II

The departmental opinion next considers, beginning on page 551, respondent's second contention that the invalidity of the act was established by evidence of its practical operation. Although having apparently held that evidence on this question was immaterial, the court does come to consider the question of fact. It states—contrary to the holding in Foote & Co. v. Stanley, supra—that the burden of proof was on the respondent railway companies to show that the expense was greater than the cost of their regulation. It states that a vast amount of supervision and regulation was necessary. But the departmental opinion makes no reference to our principal contention on this feature, viz., that expense incurred in relation to railroads was largely of a non-regulatory character, such as conducting litigation before the Interstate Commerce Commission in the interest of shippers of the State of Washington, hearing reparation claims, and other matters. The findings of the trial court go into these features in detail. (See pages 78-83 of our brief). This court makes no segregation of the cost of these expenses from the cost of proper supervisory expenses, but contents itself with the general holding that "in the very nature and necessity of things, such regulation must have a broad field, the extent of which must be determined by legislative discretion," and with a quotation from Charlotte, C. & A. R. Co. v. Gibbs, supra, that "regulation may extend to all measures deemed essential not merely to secure the safety of passengers and freight, but to promote the convenience of the public in the transaction of business with them, and to prevent abuses by extortionate charges and unjust discrimination." But it is of no aid to point out that regulation covers a broad

field when, as here, there is a direct and uncontradicted showing that the railroads are taxed for the performance of duties outside this admittedly broad field.

[fol. 127] We submit that respondent should have, and that the Supreme Court of the United States will expect, a definite holding by this court that the challenged activities of the Department either were or were not within the field of proper supervision and regulation. When that direct question is faced and the duties of the Department are analyzed, both in the light of the statute imposing these duties and the evidence showing what the Department actually does, it must be agreed that the railroads are being taxed for purposes which are, as to them, illegitimate. No other conclusion is possible.

III

The departmental opinion does not sufficiently heed and decide the respondent's contention that Chapter 107, Laws of 1929, is not imposed for, nor limited by, the reasonable cost of supervising and regulating railroad companies, but is a flat fee imposed on railroad companies and many unrelated utility companies as well to pay the expense of regulating them all in the aggregate.

We submit that constitutional guarantees will not permit the imposition of an inspection fee upon some to discharge an obligation for which others are responsible. Chapter 107, Laws of 1929, imposes on railroads and a variety of other public utility companies a flat fee of one-tenth of one per cent of the gross income of each to pay the expenses incurred by the Department in regulating and supervising all of them,—to say nothing of its other non-regulatory activities. The fee paid by the railroads is not devoted by the act to the expense of supervising and regulating railroads. While the State may impose upon a single tribunal a variety of functions, it must also provide that the tax imposed upon each business shall be devoted to supervision and regulation of that business and be not unreasonably in excess thereof. Mountain Timber Co. v. Washington, 243 U. S. 219, 61 L. Ed. 685; Foote & Co. v. Stanley, supra. Each kind of business may be charged only with the expense [fol. 128] of its own regulation or inspection. Here the fee is not so limited, nor is any method of bookkeeping provided

whereby the taxpayer may assure himself that he is being legitimately taxed. He is left at the mercy of self-serving declarations by state officials "as to the ultimate fact." (Departmental opinion, page 553). If the constitutional contentions of the taxpayer are first to be rebutted by a presumption that the Legislature acted reasonably, and second, to be denied on the ground that while there is no official record of where the money went, the State Auditor may testify "as to the ultimate fact," then, indeed, the Constitution is to the taxpayer a mere ignis fatuus. Imagine a state official ever admitting the excessiveness of a tax used for the maintenance of his bureau.

We agree that regulation and supervision may be regarded by the Legislature as in the interest and for the benefit of the corporation as well as of the public. But this just principle is circumscribed and limited by the reasons for it. Therefore a regulatory fee must be devoted to and limited by the cost of reasonable and necessary supervision of the business or industry subjected to the tax, and this limitation must either be inherent in the legislative enactment or in official records from which the taxpayer may ascertain that he is not being mulcted for the benefit of others. The Washington statute does not embody these limitations, but requires the railway companies to pay in the dark, as it were, taxes which may be used by the Department of Public Works, without check or accounting, for the purpose of regulating and supervising other public utility corporations.

For these reasons we submit that Chapter 107, Laws of 1929, violates the due process and equal protection clauses of the Fourteenth Amendment as well as the Commerce Clause of the Constitution of the United States, and we pray that a rehearing en banc be granted so that these important [fol. 129] constitutional questions may have the consideration of the entire membership of the court.

Respectfully submitted, Thomas Balmer, Edwin C. Matthias, Attorneys for Respondent.

[fol. 130] In Supreme Court of Washington

[Title omitted]

Order Denying Petition for Rehearing Filed Feb. 10, 1936

The court having considered respondent's petition for a rehearing herein;

It is Ordered that the petition be and it hereby is denied.

Dated this 10th day of February, 1936.

By the Court:

William J. Millard, Chief Justice.

[File endorsement omitted.]

[fol. 131] In Supreme Court of Washington

No. 25732. Thurston County No. 14908

Great Northern Railway Company, a Corporation, Respondent,

vs.

The State of Washington, Appellant

Judgment March 3, 1936

This cause having been heretofore submitted to the Court, upon the transcript of the record of the Superior Court of Thurston County, and upon the argument of counsel, and the Court having fully considered the same, and being fully advised in the premises, it is now, on this 3rd day of March, A. D. 1936, on motion of C. W. Hamilton, Attorney General, Esquire, of counsel for appellant, considered, adjudged and decreed, that the judgment of the said Superior Court be, and the same is hereby reversed with direction to the trial court to dismiss the action, and that the said State of Washington have and recover of and from the said Great Northern Railway Company, a corporation, the costs of this action taxed and allowed at One Hundred Twenty-Two and 70/100 ($122.70) Dollars, and that execution issue therefor. And it is further ordered, that

this cause be remitted to the said Superior Court for further proceedings, in accordance herewith.

Recorded in Journal 33, Page 119, Records of the Supreme Court of the State of Washington.

[fol. 132] [File endorsement omitted]

IN SUPREME COURT OF THE UNITED STATES.

[Title omitted]

PETITION FOR APPEAL. Filed March 3, 1936

To the Chief Justice of the Supreme Court of the State of Washington:

Your petitioner, Great Northern Railway Company, a corporation, respectfully shows:

Your petitioner is the appellant in the above entitled cause:

This is an action at law by your petitioner to recover from the State of Washington the annual fees paid under protest to the Department of Public Works of Washington under Chapter 107, Laws of 1929 (Remington's Compiled Statutes, Section 10417), for the calendar years 1929 to 1933, inclusive, over and above the fees payable to the Department of Public Works under Chapter 107, Laws of 1923 (which latter statute is revived if Chapter 107, Laws 1929, is held unconstitutional), and over and above the fees due to the Secretary of State under Chapter 227, Laws 1929. The action was tried and decided upon the amended complaint, in which recovery was prayed for the years 1929 to 1932, inclusive. The fee for the year 1933, which was also paid under protest, was included by stipulation that the amended complaint should be construed as so further [fol. 133] amended. The original and amended complaints also attacked the fees payable to the Department of Public Works under Chapter 113, Laws 1921, as amended by Chapter 107, Laws 1923, and to the Secretary of State under Chapter 227, Laws 1929, but at the trial the plaintiff did not question the validity of those statutes.

The original complaint, served and filed March 30th, 1933, demanded a money judgment of $24,162.80, the total

annual fees paid under Chapter 107, Laws 1929, for the calendar years 1929 to 1932, inclusive, together with interest; the amended complaint, served and filed March 9th, 1934, as further amended by the stipulation of the parties, demanded this same sum for the calendar years 1929 to 1932, inclusive, together with interest, plus $3,137.05, the fee paid by plaintiff under said Chapter 107, Laws of 1929, for the calendar year 1933, together with interest; but by the withdrawal by plaintiff of its attack upon Chapter 113, Laws 1921, as amended, and Chapter 227, Laws 1929, the amount in controversy was reduced to $20,946.97 for the five calendar years 1929 to 1933, inclusive, plus interest of $4,519.50, a total of $25,466.47. Plaintiff recovered judgment for this amount, together with its costs, from defendant in the Superior Court of the State of Washington for Thurston County on the first day of April, 1935.

It was the contention of appellant in the trial court and the Supreme Court of the State that said Chapter 107, Laws of 1929, contravenes the Fourteenth Amendment and the Commerce Clause of the Constitution of the United States. Appellant contended that said act is (1) void on its face, and (2) void because of its operative effect, (a) because the fee, or tax, is not imposed for, nor limited by, the reasonable cost of supervising and regulating railroad companies, but is a flat fee imposed on railroad companies, and many unrelated utility companies as well, to pay the expenses of regulating them all, in the aggregate; and (b) because the fee, [fol. 134] or tax, is imposed, both on railroad companies and on many unrelated utility companies, to pay not only the expenses incident to their supervision and regulation in general, but also the expenses of many duties and activities of the department which are not of a regulatory or supervisory nature, but are administrative, police or judicial, the expense of which cannot be imposed upon appellant in the guise of a regulatory or supervisory fee.

After hearing upon the merits the trial court on April 1, 1935, entered findings of fact, conclusions of law and judgment, concluding and deciding that said Chapter 107 of the Laws of 1929 violates Article I, Section 8, and the equal protection and due process clauses of the 14th Amendment to the Constitution of the United States, and awarding appellant judgment against appellee as heretofore stated. Thereafter an appeal was taken by the State of Washington to the Supreme Court of the State of Washington,

which court, on December 12, 1935, reversed the judgment of the trial court, and upheld the validity of said act as not being in violation of any of said provisions of the Constitution of the United States, and remanded said cause to the Superior Court with directions to dismiss the action. Appellant on January 4th, 1936, filed a petition for rehearing, which the State Supreme Court denied on February 10th, 1936, and final judgment of the Supreme Court directing dismissal of the action was so entered on the 3rd day of March, 1936.

The Supreme Court of the State of Washington is the highest court of said state in which a decision in this suit can be had.

That in said cause there is drawn in question the validity of a statute of the State of Washington on the ground that said statute is repugnant to the Constitution of the United States, and the decision is in favor of its validity, notwithstanding your petitioner's contention that said statute violates Article I, Section 8, and the equal protection and due process clauses of the 14th Amendment to the Constitution of the United States.

[fol. 135] Therefore, in accordance with Section 237 (a) of the Judicial Code, and in accordance with the Rules of the Supreme Court of the United States, your petitioner respectfully shows this court that the case is one in which, under the legislation in force when the Act of January 31, 1928, was passed, to-wit, under Section 237 (a) of the Judicial Code, a review could be had in the Supreme Court of the United States on a writ of error, as a matter of right.

The errors upon which your petitioner claims to be entitled to an appeal are more fully set out in the assignment of errors, filed herewith, pursuant to Rules 9 and 46 of the Rules of the Supreme Court of the United States; and there is likewise filed herewith a statement as to the jurisdiction of the Supreme Court of the United States, as provided by Rules 12 and 46 of the Rules of the Supreme Court of the United States.

Wherefore, your petitioner prays for the allowance of an appeal from the said Supreme Court of Washington, the highest court of said state in which a decision in this cause can be had, to the Supreme Court of the United States, in order that the decision and final judgment of the said Supreme Court of the State of Washington may be

examined and reversed, and also prays that a transcript of the record, proceedings and papers in this cause, duly authenticated by the Clerk of the Supreme Court of the State of Washington, under his hand and the seal of said Court, may be sent to the Supreme Court of the United States, as provided by law, and that an order be made touching the security to be required of the petitioner, and that the cost and supersedeas bond tendered by the petitioner be approved, and that the said appeal may operate as a supersedeas.

Dated this 3rd day of March, 1936.

F. G. Dorety, Thomas Balmer, Edwin C. Matthias,
Attorneys for Petitioner.

[fol. 136] [File endorsement omitted]

IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

ASSIGNMENT OF ERRORS AND PRAYER FOR REVERSAL—Filed March 3, 1936

Statement

Appellant's main contention in the Supreme Court of the State of Washington was that Chapter 107, Laws of 1929, is void on its face (1) because the fee, or tax, is not imposed for, nor limited by, the reasonable cost of supervising and regulating railroad companies, but is a flat fee imposed on railroad companies, and many unrelated utility companies as well, to pay the expense of regulating them all, in the aggregate; and (2) because the fee, or tax, is imposed, both on railroad companies and on many unrelated utility companies, to pay not only the expenses incident to their supervision and regulation in general, but also the expenses of many duties and activities of the Department of Public Works which are not of a regulatory or supervisory nature, but are administrative, police or judicial, the expense of which cannot be imposed upon appellant in the guise of a regulatory or supervisory fee.

The Washington Supreme Court overruled this contention on the stated ground that nothing appears on the face

of the act to indicate that it is unconstitutional and that it "must * * * be presumed that from the information possessed by it, the legislature concluded that the amount [fol. 137] of the fees as determined by the prescribed rates of percentage was reasonably necessary to meet the cost of supervising and regulating the respective utilities."

The court next considered respondent's second contention that the invalidity of the act was established by evidence of its practical operation. It held that the burden of proof was on the appellant to show that the fees collected from the railroads under the act exceeded the cost of their regulation and supervision. It stated that a vast amount of supervision and regulation was necessary. But it made no reference to appellant's principal contention on this feature, viz., that the expense incurred in relation to railroads was largely of a non-regulatory character, such as conducting litigation before the Interstate Commerce Commission in the interest of shippers of the State of Washington, hearing reparation claims and other matters. The findings of the trial court go into these features in detail. They show that the Department performs many "duties and functions relating to railroads of a non-supervisory and non-regulatory nature." The Washington Supreme Court made no segregation of the cost of these activities from the cost of proper supervisory activities, but contented itself with the general holding that "in the very nature and necessity of things such regulation must have a broad field, the extent of which must be determined by legislative discretion."

Finally, the Washington Supreme Court held that even if the State had the burden of proving that the fees collected from the railroads of the state under Chapter 107, Laws of 1929, did not exceed the cost of their proper supervision and regulation, the evidence proponderated against the findings made by the trial court as to the cost of supervising and regulating railroads. The findings of the trial court were based upon the annual reports of the Department of Public Works, made to the Governor as required by law. The evidence held by the Supreme Court to pre- [fol. 138] ponderate against these findings was that of the Auditor of the Department of Public Works, who testified that at his request, and not as a matter of official duty, the various employes of the Department handed him time slips,

showing the estimated time they devoted to the respective classes of utilities, and that this apportionment showed that the cost of "the railroad part of the Deparement of Public Works" exceeded the amount of the fees imposed upon the railroads by the act of 1929. The time turned in by the employes "took no account of the kind of work they were doing as to the regulation of railroads." It was admitted that these records were "not official in the sense of any rule or order of the Department that required them to be kept." The Auditor had no knowledge of his own whether the figures turned in by the employes were correct. This evidence of the Auditor was admitted after the case had been reopened to permit its introduction, and over appellant's objection that the evidence was hearsay. The trial court viewed the evidence as immaterial but admitted it because he "didn't want the case to come back here." The State Supreme Court held that "while the account kept by the Auditor was not official, in the sense that, of itself, it was admissible in evidence, yet what the Auditor did in that respect qualified him to testify as to the ultimate fact."

Assignment of Errors

Petitioner, Great Northern Railway Company, a corporation, assigns the following errors in the record and proceedings in this cause.

(1) The Supreme Court of the State of Washington erred in overruling appellant's contention that Chapter 107, Laws of 1929, is void on its face (1) because the fee, or tax, is not imposed for, nor limited by, the reasonable cost of supervising and regulating railroad companies, but is a flat fee imposed on railroad companies, and many unrelated utility [fol. 139] companies as well, to pay the expenses of regulating them all, in the aggregate; and (2) because the fee, or tax, is imposed, both on railroad companies and on many unrelated utility companies, to pay not only the expenses incident to their supervision and regulation in general, but also the expenses of many duties and activities of the department which are not of a regulatory or supervisory nature, but are administrative, police or judicial, the expense of which cannot be imposed upon appellant in the guise of a regulatory or supervisory fee.

(2) The Supreme Court of the State of Washington erred in holding that nothing appears on the face of the act to indicate that it is unconstitutional, and that it must "be presumed that, from the information possessed by it, the legislature concluded that the amount of the fees, as determined by the prescribed rates of percentage, was reasonably necessary to meet the cost of supervising and regulating the respective utilities."

(3) The Supreme Court of the State of Washington erred in holding that although Chapter 107, Laws of 1929, imposes a flat fee on railroad companies and many unrelated utility companies as well, to pay the expenses of regulating them all in the aggregate, and also the expenses of any and all duties and activities of the Department in connection with rairoads and other utility companies,—many of which are not of a regulatory or supervisory nature,—the burden of proof was on the appellant to show that the fees collected from the railroads exceeded the cost of their regulation.

(4) The Supreme Court of the State of Washington erred in holding and deciding that the evidence preponderated against the findings made by the trial court as to the cost of supervising and regulating railroads, viz:

(a) that it is not, and has not been, possible to separate and compute the cost of performance by the Department of Public Works of its supervisory and regulatory duties relating to railroads from the cost and expense of its supervisory and regulatory duties relating to telephone and tele-
[fol. 140] graph, electrical, water, gas and other public utility corporations; (Finding of Fact IX).

(b) that in addition to its supervisory and regulatory duties relating to railroads said Department is required by law to perform various other duties and functions relating to railroads of a non-supervisory and non-regulatory nature; in particular, the Department has the duty of prosecuting or defending various rate cases before the Interstate Commerce Commission relating to rates of interstate railroads and to rates of railroads operating in other states and not subject to its jurisdiction; that the Department incurred a large expense in said non-regulatory and non-supervisory activities, but no account is required to be kept or was kept of the amount thereof and it is impossible to

determine the same, and no attempt was made to do so on the trial of this case; (Finding of Fact X).

(c) that the Department of Public Works has also undertaken to act in a judicial capacity in overcharge and reparation cases filed in that department by shippers against railroads, including plaintiff, and has held hearings, taken testimony and made and entered awards in many of such cases in favor of the shippers and against the railroads, including plaintiff; that the Department incurred a large expense in said overcharge and reparation cases, but no account is required to be kept or was kept of the amount thereof, and it is not only impossible to determine the cost of such cases to the Department, but no attempt was made to do so in the trial of this case; (Finding of Fact X-B).

(d) that said Chapter 107, Laws of 1929, and the fee imposed thereby on railroad companies, including plaintiff, is in fact a revenue measure intended to impose, and which does impose, upon railroads and other utility corporations the cost and expense of regulating and supervising railroads and other utility corporations, and to defray the cost and expense of all of the activities of the Department, whether [fols. 141-157] or not of a regulatory and supervisory nature, and the excess collected over expenditures reverts to and is a part of the general funds of the state. (Finding of Fact XII.)

(5) The Supreme Court of the State of Washington erred in ignoring the uncontradicted evidence that the expense incurred by the Department of Public Works in relation to railroads, and defrayed by the fees imposed upon appellant and other railroads by Chapter 107, Laws of 1929, is largely caused by activities of a non-regulatory character, the expense of which has not been and cannot be segregated or determined.

(6) The Supreme Court of the State of Washington erred in considering and in basing its decision upon the evidence of the Auditor of the Department of Public Works as to the expense incurred by the Department in supervising and regulating railroads, since such evidence was pure hearsay and was inadmissible for the purpose of determining the rights asserted by the appellant under the Federal Constitution.

(7) The Supreme Court of the State of Washington for each of the reasons contained in the foregoing assignments, erred in reversing the judgment of the Superior Court of Thurston County, and in directing that appellant's action against the appellee be dismissed.

Prayer for Reversal

Wherefore, on account of the errors specified herein appellant prays that the judgment of the Supreme Court of the State of Washington in this cause dated the 3rd day of March, 1936, be reversed and judgment here entered or directed in favor of appellant.

Dated this 3rd day of March, 1936.

F. G. Dorety, Thomas Balmer, Edwin C. Matthias,
Attorneys for Appellant.

[fol. 158] [File endorsement omitted]

In Supreme Court of the United States

[Title omitted]

Order Allowing Appeal—Filed March 3, 1936

The petition of the Great Northern Railway Company, a corporation, the appellant in the above entitled cause, for an appeal in the above cause to the Supreme Court of the United States from the judgment of the Supreme Court of the State of Washington, having been filed with the Clerk of this Court and presented herein accompanied by assignment of errors and statement as to jurisdiction, all as provided by Rule 46 of the Rules of the Supreme Court of the United States, and the record in this cause having been considered, it is hereby

Ordered that an appeal be and it is hereby allowed to the Supreme Court of the United States from the final judgment dated the 3rd day of March, 1936, of the Supreme Court of the State of Washington as prayed in said petition, and that the Clerk of the Supreme Court of the State of Washington shall within sixty days from this date make and transmit to the Supreme Court of the United States, under his hand and the seal of said Court, a true copy of the material parts of the record herein, which shall be desig-

nated by præcipe or stipulation of the parties or their coun-
[fols. 159 & 160] sel herein, all in accordance with Rule 10 of the Rules of the Supreme Court of the United States.

It is further Ordered that said appellant shall have a good and sufficient cost and supersedeas bond in the sum of $5,000.00, that said appellant shall prosecute said appeal to effect and answer all damages and costs if it fails to make its plea good, and that said supersedeas bond, when filed and approved, shall stay the sending down of the mandate or remittitur herein and all proceedings in this cause until the final disposition of this cause by the Supreme Court of the United States.

It is further Ordered that appellee, the State of Washington, shall have the right to move for increase of said bond if, at any time, it shall deem itself insecure.

Dated this 3rd day of March, 1936.

William J. Millard, Chief Justice of the Supreme Court of the State of Washington.

[fols. 161-163] Supersedeas bond on appeal for $5,000.00, approved and filed March 3, 1936, omitted in printing.

[fols. 164 & 165] Citation, in usual form, showing service on G. W. Hamilton et al., filed March 3, 1936, omitted in printing.

[fol. 166] In Supreme Court of the United States

[Title omitted]

Præcipe for Transcript of Record on Appeal to the United States Supreme Court—Filed March 19, 1936

To the Clerk of the Supreme Court of the State of Washington:

You will please make and transmit to the United States Supreme Court under your hand and the seal of the Supreme Court of the State of Washington a true copy of the following material parts of the record in the above entitled cause:

1. Amended Complaint.
2. Answer to Amended Complaint.
3. Findings of Fact and Conclusions of Law of the Superior Court of the State of Washington for Thurston County.
4. Judgment of the Superior Court of the State of Washington for Thurston County, dated April 1, 1935.
5. Statement of Facts certified by the Judge of the Superior Court, including all Exhibits.
[fols. 167 & 168] 6. Notice of Appeal to Washington Supreme Court.
7. Opinion of Washington Supreme Court.
8. Petition for Rehearing.
9. Order Denying Petition for Rehearing.
10. Judgment of Washington Supreme Court.
11. Petition for Appeal to United States Supreme Court.
12. Assignment of Errors and Prayer for Reversal.
13. Statement as to Jurisdiction on appeal.
14. Order Allowing Appeal.
15. Cost and Supersedeas Bond.
16. Acknowledgment of Service of Petition for Appeal, Order Allowing Appeal, Assignment of Errors and Prayer for Reversal, and Statement as to Jurisdiction.
17. Citation, with acknowledgment of service.
18. This Præcipe.

Dated at Seattle, Washington, this 3rd day of March, 1936.

F. G. Dorety, Thomas Balmer, Edwin C. Matthias, Attorneys for Appellants. Address: 404 Union Street, Seattle, Washington.

Service of a copy of the foregoing Præcipe acknowledged this 3d day of March, 1936.

G. W. Hamilton, Atty. General; Geo. G. Hannan, Asst. Atty. General, Attorneys for Appellee. Address: Temple of Justice, Olympia, Washington.

[File endorsement omitted.]

[fol. 169] [File endorsement omitted]

IN SUPERIOR COURT OF THURSTON COUNTY

[Title omitted]

MOTION AND DEMURRER TO AMENDED COMPLAINT—Filed April 3, 1934

Comes now the Defendant by its attorneys of record herein and moves the Court:

I

That the first purported cause of Action in said Amended Complaint be ordered stricken out of the cause for the reason that the same contains more than one cause of action and said causes were not separately stated.

II

That in case motion number I be overruled that plaintiff be required to separately state and consecutively number the several causes of action in said purported First Cause of Action contained.

III

That the last paragraph of that portion of Plaintiff's said Amended Complaint designated as paragraph XIV be ordered stricken therefrom as irrelevant, redundant and immaterial.

[fol. 170]

IV

That paragraph XV of said Amended Complaint be ordered stricken therefrom as irrelevant, redundant and immaterial matter.

V

In case motion number IV be overruled that the Plaintiff be required to make said paragraph XV more definite and certain by setting out therein the amount of the alleged excess sum of Two Hundred Fifty ($250) Dollars accumulated during the year involved in said cause of action over and above the amount expended by the Department of Public Works in the discharge of its duties.

VI

That paragraph XVI of said cause of action be ordered stricken therefrom as irrelevant, redundant and immaterial matter.

VII

In case motion number VI be overruled that subdivision B of paragraph XVI be made more definite and certain by setting out therein the part or portion of the tax therein mentioned and alleged to be unrelated to the operating of common carrier railways.

VIII

In case motion number VI be overruled that subdivision D of said paragraph XVI be made more definite and certain by setting out therein what portion of the funds collected by the defendant had been used in proceedings before the Interstate Commerce Commission in connection with interstate rates and facilities.

[fol. 171] Defendant moves against the Second Cause of Action contained in Plaintiff's Amended Complaint and in doing so hereby adopts and re-alleges each and all of Defendant's motion against the First Cause of Action as against the Second Cause of Action and the paragraphs thereof respectively.

Defendant moves against the Third Cause of Action contained in Plaintiff's Amended Complaint and in doing so hereby adopts and re-alleges each and all of Defendant's motion against the First Cause of Action as against the Third Cause of Action and the paragraphs thereof respectively.

Defendant moves against the Fourth Cause of Action contained in Plaintiff's Amended Complaint and in doing so hereby adopts and re-alleges each and all of Defendant's motion against the First Cause of Action as against the Fourth Cause of Action and the paragraphs thereof respectively.

G. W. Hamilton, Attorney General; Geo. G. Hannan, Assistant Attorney General, Attorneys for Defendant.

[fol. 172] DEMURRER

Defendant demurs to the First Cause of Action in Plaintiff's Amended Complaint contained upon the following grounds and for the following reasons, to-wit:

I

That the Plaintiff has no legal capacity to sue.

II

That said purported cause of action does not state facts sufficient to constitute a cause of action.

Defendant demurs to the Second Cause of Action in Plaintiff's Amended Complaint contained upon the following grounds and for the following reasons, to-wit:

I

That the Plaintiff has no legal capacity to sue.

II

That said purported cause of action does not state facts sufficient to constitute a cause of action.

Defendant demurs to the Third Cause of Action in Plaintiff's Amended Complaint contained upon the following grounds and for the following reasons, to-wit:

I

That the Plaintiff has no legal capacity to sue.

II

That said purported cause of action does not state facts sufficient to constitute a cause of action.

Defendant demurs to the Fourth Cause of Action in Plaintiff's Amended Complaint contained upon the following grounds and for the following reasons, to-wit:

[fol. 173] I

That the Plaintiff has no legal capacity to sue.

II

That said purported cause of action does not state facts sufficient to constitute a cause of action.

G. W. Hamilton, Attorney General; Geo. G. Hannan, Assistant Attorney General, Attorneys for Defendant.

[File endorsements omitted.]

[fol. 174] PLAINTIFF'S EXHIBIT No. 4

Thurston County Cause No. 14908-11

Date Admitted 1/3/35

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR THURSTON COUNTY

Filed in Clerk's Office Supreme Court State of Washington Jun. 25, 1935, Benj. T. Hart, Clerk, by Stewart, Dep.

No. 14909

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation, Plaintiff,

v.

STATE OF WASHINGTON, Defendant

STIPULATION

It is Stipulated that the plaintiff paid the fee prescribed by Chapter 107, Laws of 1929, for the year ending December 31, 1933, under protest, as per attached copies, amounting to $5,700.53, and that the plaintiff's amended complaint may be considered as amended or supplemented to claim recovery for the fee for the year ending December 31, 1933, and that judgment may be rendered for or against the plaintiff or defendant on account of said payment for the year 1933 as is rendered for fees paid for the other years involved in said amended complaint and that no for-

mal amended or supplemental complaint need be filed covering said payment for the year 1933, and defendants' motions and demurrers to amended complaint shall apply thereto.

Dated the 10th day of April, 1934.

L. B. daPonte, Attorney for Plaintiff; G. W. Hamilton, Atty. General; Geo. G. Hannan, Asst. Atty. General, Attorneys for Defendant.

Filed Superior Court Thurston Co., Wash., Apr. 13, 9:02 A..M., 1934—Paul Paulk, Clerk, by —— ——, Deputy.

[fol. 175] (Copy)

8284.

To the Department of Public Works of Washington:

The Northern Pacific Railway Company hereby tenders to you the sum of Fifteen Hundred Dollars ($1500.00), being the amount of the fee for year ended December 31, 1933, provided by Section 10417 of Remington Compiled Statutes, which tender is made without prejudice to the claim of the Northern Pacific Railway Company that said section 10417 is and constitutes a burden upon interstate commerce as applied to the Northern Pacific Railway Company, contrary to Article I, Section 8 of the Constitution of the United States. The Northern Pacific Railway Company makes this tender and payment without prejudice to your right to claim the fee provided by Chapter 107, Laws of 1929 amending said Section 10417. The Northern Pacific Railway Company alleges that the fee provided to be paid by said Chapter 107, Laws of 1929, is, as to it, a burden on interstate commerce, contrary to Article I, Section 8 of the Constitution of the United States; and is discriminatory and unequal in its application to other like corporations similarly situated and in violation of the 14th Amendment to the Constitution of the United States.

Dated the — day of March, 1934.

Northern Pacific Railway Company, by L. B. daPonte, Western Counsel.

The Department of Public Works of Washington hereby acknowledges that the foregoing tender was made and refused on the 29th day of March, 1934.

Department of Public Works of Washington, by C. S. Stookey, Auditor.

[fol. 176] (Copy)

8284.

Protest

The Department of Public Works of Washington hereby acknowledges receipt from the Northern Pacific Railway Company of the sum of Five Thousand Seven Hundred and 53/100 Dollars ($5,700.53), being the fee prescribed by Chapter 107, Laws of 1929, for year ended December 31, 1933.

The Northern Pacific Railway Company pays said fee under protest for the reason that it claims that said Chapter 107, Laws of 1929, levies an unlawful tax and fee and imposes a burden upon interstate commerce, contrary to Article I, Section 8 of the Constitution of the United States, and is as to the Northern Pacific Railway Company null and void. The Northern Pacific Railway Company further alleges that said tax or fee is discriminatory and unequal in its application to other like corporations similarly situated, and is in violation of the 14th Amendment to the Constitution of the United States and null and void as to said Northern Pacific Railway Company.

Dated the 29th day of March, 1934.

Department of Public Works of Washington, by C. S. Stookey, Auditor.

[fol. 177] In Supreme Court of the United States

[Title omitted]

Præcipe for Additional Portions of Record—Filed March 24, 1936

To the Clerk of the Supreme Court of the State of Washington:

You will please make and transmit to the United States Supreme Court under your hand and the seal of the Supreme Court of the State of Washington, a true copy of the following material parts of the record in the above entitled cause:

1. Defendant's motions against amended complaint;
2. Defendant's demurrer to amended complaint;

3. Exhibit No. 4, to the testimony;
4. Copy of this præcipe.

Dated at Olympia, Washington, this 24th day of March, 1936.

G. W. Hamilton, Attorney General; Geo. G. Hannan, Assistant Attorney General, Attorneys for Appellee. Post Office Address: Temple of Justice, Olympia, Washington.

[File endorsement omitted.]

[fol. 178] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 179] Clerk's certificate to exhibits omitted in printing.

[fol. 180] PLAINTIFF'S EXHIBIT No. 1

Thurston County Cause No. 14908-11

Date Admitted 1/3/35

Receipt for Payment under Protest

The Department of Public Works of Washington hereby acknowledges receipt from the Great Northern Railway Company of the sum of $3,137.05, being fee prescribed by Chapter 107, Laws of 1929, for the calendar year ended December 31, 1933.

The Department acknowledges that the Great Northern Railway Company paid said fee under protest, for the reason that it claims that said Chapter 107, Laws of 1929, imposes a tax on said Railway Company's property devoted to commerce among the states and with foreign nations, and a tax on such commerce in violation of Section 8, Article I of the Constitution of the United States, and operates to tax the property of said Railway Company in other states having no taxable situs in Washington, and thus deprives it of its property without due process of law, in violation of the

Fourteenth Amendment to the Constitution of the United States, and that said tax or fee is discriminatory and unequal as between said Great Northern Railway Company and other corporations similarly situated, and thus denies said Railway Company the equal protection of the laws, in violation of said Fourteenth Amendment to the Constitution of the United States, and that the tax imposed by said statute is in violation of the Constitution of the United States, in that it is imposed at least in part for the purpose of regulating and inspecting other public utilities, in no way related to, or connected with the business of operating a common carrier railway, and for the purpose of defraying the expense of performing functions and furnishing services entirely disconnected from the regulation of railways, and for the purpose of regulating and supervising interstate services, facilities and rates of railroads engaged in interstate commerce; that the tax is imposed and used in part for the purpose of defraying the expenses of the Department of Public Works in proceedings before the Interstate Commerce Commission, in connection with interstate rates, services and facilities, and that no such tax is imposed upon persons directly benefited by such proceeding, and that the fees collected have exceeded the cost of regulation and inspection of the railroads by such a large sum that the tax imposed by said statute is unreasonable and disproportionate to the services rendered, and that Chapter 107, Laws of 1929, in effect levies a tax upon revenue derived from the transportation of mails, passengers, freight and express for the Government of the United States, and thereby imposes a burden upon, and interferes with, the exercise of governmental powers of the Federal Government, which the Constitution of the United States contemplates shall be supreme and independent of state supervision or regulation, and for said reasons the tax or fee imposed by said Chapter 107, Laws of 1929, is unlawful, null and void as to said Great Northern Railway Company.

Dated the 29th day of March, 1934.

Department of Public Works of Washington, by C. L. Stookey, Auditor.

[fol. 181] PLAINTIFF'S EXHIBIT No. 2

Thurston County Cause No. 14908-11

Date Admitted 1/3/35

Department of Public Works,
State of Washington,
Olympia, Wash.

No. 8290.
Mar. 29, 1934.

Received from C. M. St. P. & P. R. R. Co.
Seattle

A. T. Gross Revenue Fee	
A. T. Application Fee	
Report Filing Fee, Year 1933	1302.16
M. V. Permit Gross Revenue Fee	
M. V. Permit Application Fee	
M. V. Permit License Plates	
Storage Warehouse Gross Rev. Fee	
Storage Warehouse Application Fee	
Scale Test Fee, Report No	
Miscellaneous Fee, Bill No	
Certified Boat Fee	
Office of Transportation Accountant	
To be Refunded to (Paid under Protest)	
Total	1302.16

Department of Public Works, by C. S. Stookey, Cashier.

[fols. 182-448] PLAINTIFF'S EXHIBIT No. 3

Thurston County Cause No. 14908-11

Date Admitted 1/3/35

The Department of Public Works of the State of Washington hereby acknowledges receipt from the Oregon-Washington Railroad & Navigation Company of the sum of Seven Hundred Twelve and 87/100 Dollars ($712.87), being the fee prescribed by Chapter 107, Laws of 1929.

The Oregon-Washington Railroad & Navigation Company pays said fee under protest for the reason that it claims that said Chapter 107, Laws of 1929, levies an unlawful tax and fee and imposes a burden upon interstate commerce, contrary to Article 1, Section 8 of the Constitution of the United States, and is, as to the Oregon-Washington Railroad & Navigation Company, null and void. The Oregon-Washington Railroad & Navigation Company further alleges that said tax or fee is discriminatory and unequal in its application to other like corporations similarly situated, and is in violation of the 14th Amendment to the Constitution of the United States and null and void as to said Oregon-Washington Railroad & Navigation Company.

Dated the 28 day of March 1934.

Department of Public Works by C. L. Stookey, Auditor.

[fols. 449-646)

PLAINTIFF'S EXHIBIT No. 12

Thurston County Cause No. 14908-11

Date Admitted 1/3/35

Great Northern Railway Company

	1929	1930	1931	1932	1933
Miles of Track Operated:					
Within State	1,935.85	1,938.65	1,931.57	1,925.50	1,929.19
Outside of State	9,932.73	9,996.89	9,992.67	10,124.06	10,906.85
Total for System	11,868.58	11,935.54	11,924.24	12,049.56	11,936.04
Amount of Stock Authorized:					
Common Stock:					
Par Value	None	None	None	None	None
Number of Shares	None	None	None	None	None
Preferred Stock:					
Par Value	$100	$100	$100	$100	$100
Number of Shares	2,500,000	2,500,000	2,500,000	2,500,000	2,500,000
Revenue from Operations:					
Total Railway Operating Revenue (Entire System)	$125,932,807.81	$104,996,076.26	$77,087,454.70	$55,549,246.37	$61,923,891.43
Total Railway Operating Revenue	17,549,476.39	15,372,895.03	11,778,584.93	8,389,154.17	8,114,350.47
(State Only)	8,027,770.40	7,267,082.52	5,528,981.62	3,338,973.43	3,137,046.87
From Intrastate	9,521,705.99	8,105,812.51	6,249,603.31	5,050,180.74	4,977,303.60
From Interstate					
Value in State as Fixed by Tax Commission:					
Actual Value	81,000,000	81,000,000	81,000,000	69,574,000	66,100,000
Equalized Value	35,356,975	35,381,092	35,384,885	30,710,723	29,304,046

[fol. 647] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 648] SUPREME COURT OF THE UNITED STATES

APPELLANT'S STATEMENT OF POINTS TO BE RELIED UPON AND PARTS OF RECORD NECESSARY FOR THE CONSIDERATION THEREOF—Filed March 30, 1936

Appellant intends to reply upon the following points as ground for the reversal of the judgment of the Supreme Court of the State of Washington from which this appeal is taken:

(1) The Supreme Court of the State of Washington erred in overruling appellant's contention that Chapter 107, Laws of 1929, is void on its face (1) because the fee, or tax, is not imposed for, nor limited by, the reasonable cost of supervising and regulating railroad companies, but is a flat fee imposed on railroad companies, and many unrelated utility companies as well, to pay the expenses of regulating them all, in the aggregate; and (2) because the fee, or tax, is imposed, both on railroad companies and on many unrelated utility companies, to pay not only the expenses incident to their supervision and regulation in general, but also the expenses of many duties and activities of the department which are not of a regulatory or supervisory nature, but are administrative, police or judicial, the expense of which cannot be imposed upon appellant in the guise of a regulatory or supervisory fee.

[fol. 649] (2) The Supreme Court of the State of Washington erred in holding that nothing appears on the face of the act to indicate that it is unconstitutional, and that it must "be presumed that, from the information possessed by it, the legislature concluded that the amount of the fees, as determined by the prescribed rates of percentage, was reasonably necessary to meet the cost of supervising and regulating the respective utilities."

(3) The Supreme Court of the State of Washington erred in holding that although Chapter 107, Laws of 1929, imposes a flat fee on railroad companies and many unrelated utility companies as well, to pay the expenses of regu-

lating them all in the aggregate, and also the expenses of any and all duties and activities of the Department in connection with railroads and other utility companies,—many of which are not of a regulatory or supervisory nature,—the burden of proof was on the appellant to show that the fees collected from the railroads exceeded the cost of their regulation.

(4) The Supreme Court of the State of Washington erred in holding and deciding that the evidence preponderated against the findings made by the trial court as to the cost of supervising and regulating railroads, viz:

(a) that it is not, and has not been, possible to separate and compute the cost of performance by the Department of Public Works of its supervisory and regulatory duties relating to railroads from the cost and expense of its supervisory and regulatory duties relating to telephone and telegraph, electrical, water, gas and other public utility corporations; (Finding of Fact IX).

(b) that in addition to its supervisory and regulatory duties relating to railroads said Department is required by law to perform various other duties and functions relating to railroads of a non-supervisory and non-regulatory nature; in particular, the Department has the duty of prosecuting or defending various rate cases before the Inter-[fol. 650] state Commerce Commission relating to rates of interstate railroads and to rates of railroads operating in other states and not subject to its jurisdiction; that the Department incurred a large expense in said non-regulatory and non-supervisory activities, but no account is required to be kept or was kept of the amount thereof and it is impossible to determine the same, and no attempt was made to do so on the trial of this case; (Finding of Fact X).

(c) that the Department of Public Works has also undertaken to act in a judicial capacity in overcharge and reparation cases filed in that department by shippers against railroads, including plaintiff, and has held hearings, taken testimony and made and entered awards in many of such cases in favor of the shippers and against the railroads, including plaintiff; that the Department incurred a large expense in said overcharge and reparation cases, but no account is required to be kept or was kept of the amount thereof, and it is not only impossible to determine the cost of such

cases to the Department, but no attempt was made to do so in the trial of this case; (Finding of Fact X-B).

(d) that said Chapter 107, Laws of 1929, and the fee imposed thereby on railroad companies, including plaintiff, is in fact a revenue measure intended to impose, and which does impose, upon railroads and other utility corporations the cost and expense of regulating and supervising railroads and other utility corporations, and to defray the cost and expense of all of the activities of the Department, whether or not of a regulatory and supervisory nature, and the excess collected over expenditures reverts to and is a part of the general funds of the state. (Finding of Fact XII).

(5) The Supreme Court of the State of Washington erred in ignoring the uncontradicted evidence that the expense incurred by the Department of Public Works in relation to railroads, and defrayed by the fees imposed upon appellant [fol. 651] and other railroads by Chapter 107, Laws of 1929, is largely caused by activities of a non-regulatory character, the expense of which has not been and cannot be segregated or determined.

(6) The Supreme Court of the State of Washington erred in considering and in basing its decision upon the evidence of the Auditor of the Department of Public Works as to the expense incurred by the Department in supervising and regulating railroads, since such evidence was pure hearsay and was inadmissible for the purpose of determining the rights asserted by the appellant under the Federal Constitution.

(7) The Supreme Court of the State of Washington for each of the reasons contained in the foregoing assignments, erred in reversing the judgment of the Superior Court of Thurston County, and in directing that appellant's action against the appellee be dismissed.

Appellant thinks the following parts of the record are necessary for the consideration of said points and requests that said parts of the record be printed:

1. Amended Complaint
2. Answer to Amended Complaint
3. Findings of Fact and Conclusions of Law of the Superior Court of the State of Washington for Thurston County

4. Judgment of the Superior Court of the State of Washington for Thurston County, dated April 1, 1935

5. Statement of Facts certified by the Judge of the Superior Court, including Exhibits 1, 2, 3, and 12, but excluding Exhibits 5, 6, 7, 8, 9, 11 and 13 (printed pamphlets)

6. Notice of Appeal to Washington Supreme Court.

7. Opinion of Washington Supreme Court

8. Petition for Rehearing

9. Order denying Petition for rehearing.

10. Judgment of Washington Supreme Court

[fol. 652] 11. Petition for Appeal to United States Supreme Court

12. Assignment of Errors and Prayer for Reversal

13. Statement as to Jurisdiction on Appeal

14. Order allowing Appeal

15. Cost and Supersedeas Bond

16. Acknowledgment of Service of Petition for Appeal, Order allowing Appeal, Assignment of Errors and Prayer for Reversal, and Statement as to Jurisdiction

17. Citation, with acknowledgment of service

18. Præcipe for Transcript on Appeal.

Dated at Seattle, Washington, this 16th day of March, 1936.

F. G. Dorety, Office Address: 1120 Great Northern Building, Saint Paul, Minnesota; Thomas Balmer, Edwin C. Matthias, Office Address: 404 Union Street, Seattle, Washington, Attorneys for Appellant.

Service of a copy of the foregoing Statement acknowledged this 19 day of March, 1936.

G. W. Hamilton, Attorney General; Geo. G. Hannan, Assistant Attorney General; Office Address: Temple of Justice, Olympia, Washington, Attorneys for Appellee.

[fol. 653] [File endorsement omitted.]

Endorsed on cover: File No. 40,432. Washington Supreme Court. Term No. 878. Great Northern Railway Company, appellant, vs. State of Washington. Filed March 30, 1936. Term No. 878, O. T., 1935.